(1)

89-1226

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JAMES GEORGE WALKER,

Petitioner,

v.

SUBURBAN HOSPITAL ASSOCIATION, JOAN FINNERTY, PAUL QUINN, JAMES GARY, BERNETTE WELCH, CHARLES STEWART, LLOYD GREEN, DALTON WILLIAMSON, ERIC E. JOHNSON, HEIDI CHRISTYL MARCHAND, AESTER HAILU,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AT RICHMOND, VIRGINIA

JAMES G. WALKER, R.Ph., J.D.
1412 Whittier Place, N.W.
Washington, D.C. 20012
(202) 723-0593
(301) 565-5960

Petitioner Pro Se.

QUESTIONS PRESENTED

This petition presents the following questions under the United States Constitution.

1. When suing for punitive and compensatory damages under U.S.C. 42, Section 1981, is a jury trial a right?

2. Is a purely private institution impressed with a 14th Amendment duty, an 8th Amendment duty, a 5th Amendment duty?

3. Is there a conflict in the interpretation of *Patterson v. McLean Credit Union,* 109 S.Ct. 2363 (1989) between the United States Court of Appeals for the Fourth Circuit (Instant Case No. 89-1412) and the United States Court of Appeals for the District of Columbia Circuit (Case No. 89-7032)?

4. Can an institution receiving Federal funds practice racial discrimination and sex discrimination?

5. Does the Seniority System prevail for promotion?

6. Are issues involving racial discrimination, economic exploitation, and health impairment frivolous?

7. Is there disparate impact and disparate treatment by leaving in a position of authority an individual involved in an IV incident in which a person died after being administered the said IV Solution?

PARTIES

The original respondents are as indicated. The original petitioner is as indicated.

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JAMES GEORGE WALKER,

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v.

SUBURBAN HOSPITAL ASSOCIATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS AT RICHMOND, VIRGINIA

The petitioner, James G. Walker, respectfully requests that a writ of certiorari issue to review the decision of the Fourth Circuit Court of Appeals at Richmond, Virginia entered in this case on September 19, 1989. The Order denying the Petition for a rehearing was filed November 29, 1989.

OPINION BELOW

On March 25, 1988 the Fourth Circuit Court of Appeals in No. 87-3177 Affirmed in Part, Reversed in Part,

and Remanded for § 1981 the Opinion of the District Court of Maryland at Baltimore. The Fourth Circuit No. 87-3117 is printed in Appendix E at p. 15a. The Fourth Circuit Court of Appeals No. 89-1412 granting dismissal on § 1981 is printed in Appendix Z at p. 109a.

JURISDICTIONAL GROUNDS

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The petition is being docketed within 90 days of the denial of the petitioner's petition for a rehearing on November 29, 1989.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves the Fifth, Fourteenth, Eighth, Seventh Amendments of the United States Constitution; the Contract Clause of the United States Constitution; the Civil Rights Restoration Act—Public Law 100-259; 42 U.S.C. § 1981; 41 U.S.C. § 1982; Title VII Civil Rights Act 1964; Diversity of Citizenship.

The pertinent parts are provided.

Fifth Amendment:

> No person shall be deprived of property without due process of law.

Seventh Amendment:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

Fourteenth Amendment:

> Shall not deprive any person of property without due process of law, nor deny the equal protection of the law.

Civil Rights Restoration Act of 1987, Public Law 100-259:

Private organization engaged in business of health care and receiving Federal financial assistance is barred from practicing discrimination.

Title 42, U.S.C. § 1981:

. . . Equal right . . .

Title 42, U.S.C. § 1982:

. . . Property Rights . . .

Title VII, Equal Employment Opportunity of 1964 Civil Rights Act:

. . . Racial discrimination . . .

Contract Clause—Article I, § 10:

Law impairing the obligation of Contracts

Diversity of Citizenship + Article III, § 2:

Controversies between citizens of Different states.

Eighth Amendment:

Cruel and unusual punishments shall not be inflicted.

STATEMENT

A. The Petitioner

On March 24, 1986 Petitioner James G. Walker sued his former employer Suburban Hospital Association, et al., on claims under 42 U.S.C. § § 1981, 1982, 1983, and 1985; Title VII of the Civil Rights Act of 1964; 42 U.S.C. § 2002 et seq.; Fifth and Fourteenth Amendments; claims for breach of contract and harmful exposure to carcinogenics were brought also. He sought punitive and compensatory damages. (The amended Complaint and the Order to Amend are printed in the Appendix A and Appendix C at pages 1a, 4a.)

B. Proceeding Below

(1) On May 16, 1984, petitioner, a black male, signed a contract with respondent Suburban as a night pharmacist. (Contract printed in Appendix Q, p. 63a-64a.) The contract provided that Suburban would have to provide petitioner with thirty days' notice before dismissal. (2) On August 13, 1984 respondent Suburban hired respondent Marchand, a white female, at a higher salary than petitioner. Later, respondent Marchand was given a retroactive pay raise. (3) On March 20, July 15, May 30, and September 9, 1985 other white pharmacists were hired by respondent Suburban at higher pay rates than the petitioner. The pharmacist hired September 9, 1985 did not have a Maryland Pharmacist License at the time. Appendix R, p. 65a, confirms such. (4) On September 23, 1985, petitioner wrote to respondent Gary about the hazards of working with carcinogens and about pay disparities. (Document printed in the Appendix J, p. 37a.) (5) On October 30, 1985 respondent Marchand put an accusatory statement in petitioner's file (Appendix N, p. 46a.) Petitioner was not given an opportunity to rebut the statement. (6) On January 8, 1986 respondent Johnson advised petitioner to place codes on cards. Petitioner asked a technician to do it, and she refused. When petitioner reported the incident to respondent Williamson petitioner was told that petitioner was not the technician's boss and that petitioner must code the cards. (7) On January 9, 1986 petitioner met with respondents Gary and Williamson. Respondent Gary refused to hear evidence about other pharmacists' failure to code cards. Respondent Williamson then gave petitioner a pre-prepared disciplinary document. (8) On January 9, 1986 respondent Quinn was informed of the incident of January 8. He "appeared to indicate" that

he and respondent Welch agreed with the actions of respondents Gary and Williamson. (9) On February 5, 1986 respondent Hailu attempted to get petitioner to sign a document concerning his job responsibilities. (10) On February 19, 1986 respondent Johnson accused the petitioner of being incompetent. *Respondent Johnson had been involved in an IV Solution incident in which a patient died four hours after being administered the said IV Solution.* Petitioner reminded respondent Johnson of his involvement in the said IV Solution. (Document on IV Solution incident printed in Appendix H, p. 30a.) (11) On February 21, 1986 respondent Johnson suspended petitioner, and respondent Welch confirmed the suspension. (12) Respondent Stewart is the Assistant Administrator of Finance for respondent Suburban and respondent Green is respondent Welch's supervisor. (13) Petitioner was not paid "night differential pay."

REASONS FOR GRANTING THE WRIT

The Court has an opportunity to clarify 42 U.S.C. § 1981 in *Patterson v. McLean*, *behavior after contract*, with *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65-66 (1986), *working in non-hostile environment.*

In the instant case, the Fourth Circuit Court of Appeals in No. 89-1412 refused to remand in view of *Patterson v. McLean*. The United States Court of Appeals for the District of Columbia No. 89-7032 remanded the case for reconsideration in light of *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989).

In the instant case respondent Suburban is in violation of Public Law 100-259 "Civil Rights Restoration Act"—receiving Federal Funds but practicing racial discrimination in employment. In Supreme Court Docket

No. 88-1970, *Burning Tree v. Maryland*, which parallels the instant case–tax exempt institution practicing discrimination–the Court denied certiorari for *Burning Tree* October 3, 1989.

The tenet of law enunciated in *Hishon v. King*, 467 U.S. 69 (1984), "doling out benefits in a discriminatory manner," is violated by respondent Suburban. Petitioner did not receive "night shift differential." White nurses received "night shift differential." In the *Birmingham, Alabama Firefighters Case* blacks who had less seniority could not be promoted over whites. In the instant case, the petitioner had more seniority at Suburban than the whites who were paid higher base salaries than he.

I. CONSTITUTIONAL TENETS. THIS CASE RAISES ISSUES ARISING FROM AN INSTITUTION RECEIVING FEDERAL FUNDS AND PRACTICING RACIAL DISCRIMINATION.

A. INSTITUTION GIVES PRETEXTUAL REASONS FOR DISCRIMINATING AGAINS THE PETITIONER.

Respondent Suburban raises the pretext of education and experience. Pursuant to *Patterson v. McLean*, petitioner does not have to prove that he is more qualified than the white pharmacists paid more base salary than he, with less seniority than he. However, the petitioner has three college degrees: B.S. in Zoology, B.S. in Pharmacy, and J.D. in Law. More training is required to receive a J.D. Degree than is required to receive a Pharm. D. Degree. Personnel List dated October 23, 1985 (printed in Appendix M at p. 44a) gives pay information, etc. It can be determined that persons who had neither a Pharm.D. Degree nor a J.D. Degree are receiv-

ing higher pay. Therefore, it can be concluded that a Pharm.D. Degree was not a prerequisite for advancement. To require the same for the petitioner is an act of discrimination. (*Patterson* did not overturn *Runyon*.)

With reference to experience, the petitioner has worked in the Pharmacy Department of a hospital since 1980, from pharmacy technician to licensed pharmacist. Pursuant to Policy statement dated 5-27-82, seniority is a consideration for promotion (printed in Appendix K at page 39a). As in the *Birmingham, Alabama Firefighters Case*, blacks who had less seniority could not be promoted over the whites who had more seniority. The same tenet of Law should prevail in the instant case for the petitioner.

The pretext is continued further by the apparent perjured testimony of respondents Welch (App. T, p. 78a) and Finnerty (App. U, p. 80a). From the Documents, Barbara J. Dowd, a white Pharmacist, was hired 9-9-85. Her base salary was higher than the petitioner. On 9-9-85 Barbara J. Dowd did not possess a Maryland Pharmacist License. A Document from the Maryland Board of Pharmacy, dated November 16, 1988 states: "Ms. Dowd applied for a Maryland Pharmacist License on 11-8-85 and became authorized to practice pharmacy 11-20-85." The Affidavit, October 13, 1988, of respondent Welch, page 3, paragraph 8d: "Ms Dowd held a pharmacy license from Ohio but did not begin work at Suburban until she made application to convert her Ohio license to a Maryland license." This Statement of respondent Welch conflicts with the Document of the Pharmacy Board of Maryland. Interrogatory No. 23 to Finnerty: "From April 1, 1984 to May 31, 1986 was, at any time, a white person hired as a Pharmacist without possessing a Maryland Pharmacy License? (hired at Suburban and worked

without a Maryland Pharmacy License)" Response to Interrogatory 23: "No." This Response of respondent Finnerty conflicts with the Document of the Maryland Pharmacy Board. Moreover, another white pharmacist with more seniority admitted that he was unable to do the work. Even with a reduced salary, the said base salary of the said pharmacist remained higher than that of the petitioner. Therefore, from every indication the petitioner was being discriminated against and being exploited.

The pretext continues with the "night shift differential" being paid to nurses and not to the petitioner. From a Document captioned SHIFT DIFFERENTIALS, dated 5-14-84 (printed in Appendix L, p. 42a):

> "3. An Employee who is scheduled to work 10:00 P.M. to 6:30 A.M. would be paid 8 hours of Night Differential."

The pretext alleges nurse shortage. However, from a Document captioned HUMAN RESOURCES, dated October 5, 1989 (printed in Appendix AA, p. 114a), brought to the attention of the Fourth Circuit Court of Appeals, is highlighted: "There is a Nationwide shortage of Pharmacists working in hospitals. Pharmacists are among the top 5 most difficult Hospital Employees to recruit and retain according to a 1988 'American Hospital Association Survey.' " Starting salaries of Hospital Pharmacists are between 5 and 10 thousand dollars less than Pharmacists employed in Retail Business. (The petitioner had both Hospital and Retail experience but was paid less than the white Pharmacists.) When Pharmacists are freed from non-clinical tasks, they are able to devote more time to clinical tasks (without the necessity of a Pharm.D. Degree). The shortage of Nurses does

not affect the quality of patient care according to 67% of 1,159 Health Care Chief Executive Officers. From the foregoing it is seen that not only was the petitioner discriminated against but that respondent Suburban violated its own policy. The tenet of Law enunciated in *Hishon v. King*, 104 S.Ct. 2229 (1984) is applicable: "A benefit that is part and partial of the employment relationship, even though it is not required by express or implied contract may not be doled out in a discriminatory fashion."

The instant case is parallel to the tenet of Law enunciated in *McDaniel v. Board of Public Instruction for Escambia County, Fla.*, 39 F. Supp. 638, July 3, 1941. In *McDaniel* the policy of paying Negro teachers at a lower rate than white teachers was considered a denial of equal protection of the laws. One of the Attorneys in *McDaniel* was Associate Justice Thurgood Marshall.

In *Bowen v. City of New York*, Supreme Court Docket No. 84-1983 decided June 2, 1986, the Court held Federal Courts are not always required to defer to administrative agencies "where the equities" require judicial intervention. The *Bowen* Decision provides a bypass of exhausting administrative remedies. Therefore, the tenets of Law enunciated in various Constitutional Issues can be asserted directly.

In the instant case, Fourth Circuit No. 87-3117 remanded for § 1981 and determined the non-exclusivity of Title VII. Pursuant to *Shaare Tefila Congregation v. Cobb*, Supreme Court Docket No. 85-2156, Decided May 18, 1987, a remand should also have been made for 42 U.S.C. § 1982. "Property" denotes a broad range of interest. Therefore, "salary" is also a "property." *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701.

In *Watson v. Fort Worth Bank & Trust*, Supreme Court Docket No. 86-6139, Decided June 29, 1988, the Court concluded that disparate impact analysis may be applied to a discretionary promotion system. Statistical data may be a determining factor for proving racial discrimination in employment. The statistic is 100% against the petitioner in the instant case. (All the white pharmacists with less seniority getting more base pay than the petitioner.)

In action alleging racial discrimination in employment under 42 U.S.C. § 1981, petitioner is entitled to jury trial as he seeks compensatory and punitive damages.

(a) *Moore v. Sun Oil Co.* (1980, CA 6 Ohio), 636 F.2d. 154

(b) *Setser v. Nocack Invest. Co.* (1981, CA 8 Mo), 102 S.Ct. 615

(c) *Edwards v. Boeing Vertol Co.* (1983, CA 3 Pa), 104 S.Ct. 3566

(d) *Laskaris v. Thornburgh* (1984, CA 3 Pa), 105 S.Ct. 260

The Seventh Amendment preserves the right of a jury trial.

Employment discrimination action under 42 U.S.C. § 1981 can be based on proof of either "disparate treatment" or "disparate impact." *Ingram v. Madison Square Garden* (1979, SD NY), 482 F. Supp. 414. Proof of employment discrimination under Title VII on theory of disparate treatment is sufficient to establish proof of liability under 42 U.S.C. § 1981. *Whatley v. Skaggs Co.* (1980, DC Col), 104 S.Ct. 349.

Individual employee of Corporate Respondent may be liable in action alleging employment discrimination under 42 U.S.C. § 1981 for same action that allegedly

gave rise to Corporate liability. *Manuel v. International Harvester Co.* 1900, ND Ill), 502 F. Supp. 45.

Fact that employee charging race discrimination was replaced with individual of same race may not rebut prima facie case of discrimination, replacement may have been made to cover discrimination. *Wofford v. Safeway Stores, Inc.* (1978, ND Cal), 78 F.R.D. 460. The tenet of Law enunciated in *Wofford* refutes respondent Suburban's assertion of hiring a black at a higher salary shows race neutral. The said black worked for a short period of time at Suburban. The Record shows that the said Black had difficulty with respondent Johnson (Appendix V, p. 00a). This is another pretext of respondent Suburban. The said Black was having trouble in IV; Eric Johnson was in charge of IV.

Judgment in class action determining that employer did not engage in general pattern or practice of racial discrimination against certified class of employees does not preclude *class member* from maintaining civil action alleging *individual claim* of racial discrimination. *Cooper v. Federal Reserve Bank* (1984, US), 104 S.Ct. 2794.

A District Court has jurisdiction to consider matters of due process under the 5th Amendment applicable to private conduct. *Mathis v. Opportunities Industrialization Centers, Inc.* (CA 9 Cal), 545 F.2d. 97. The due process clause of the Fifth Amendment authorizes traditional equal protection of federal rules, and therefore the clause has a substantive as well as a procedural aspect.

Hampton v. Mow Sun Wong, 426 U.S. 88, 48 L.Ed.2d 495, 96 S.Ct. 189.

Petitioner's due process rights were denied when respondents did not give him an opportunity to present

evidence vindicating him. A "hearing" is the hearing of evidence and arguments. *Handlon v. Belleville*, 4 N.J. 99, 71 A.2d 624, 16ALR.2d 1115. Right to introduce evidence. *Jenkins v. McKeithen*, 395 U.S. 411, 232 L.Ed.2d 404, 89 S.Ct. 1843, *reh. den.* 396 U.S. 869, 24 L.Ed. 123, 90 S.Ct. 35.

An act of conspiracy was committed by respondents Marchand, Williamson, and Johnson in the writing of and putting an accusatory letter in a file on the petitioner without first giving the petitioner an opportunity to rebut the same. An act of conspiracy was committed by respondents Williamson and Johnson by their ordering petitioner to code when not demanding the white pharmacists to do the same. An act of conspiracy was committed by respondents Williamson and Gary when at a meeting with the petitioner and them, a disciplinary paper was given to the petitioner. The indication is that the said disciplinary paper had been prepared before the meeting. The outcome had been pre-determined. Due process was violated. The evidence of the petitioner was not permitted. Respondents Hailu, Williamson, and Johnson committed an act of conspiracy by attempting to compel the petitioner to sign some document. Respondents Williamson and Johnson told respondent Hailu to compel petitioner to sign the said document. Respondents Finnerty, Quinn, Welch, Stewart, and Green become conspirators by aiding and abetting the actions of the other respondents. Respondents Finnerty, Stewart, and Welch conspired to pay the petitioner a lower base salary than white pharmacists.

A private enterprise is impressed with a 14th Amendment duty by Interstate Commerce Commission regulation: goods transported over different state roads. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

A 14th Amendment duty is impressed when the private activity performs an exclusive public function. *Marsh v. Alabama*, 326 U.S. 501 (1946). When there is "significant state involvement," the 14th Amendment is applicable to private discrimination. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

Respondent Johnson was involved in an IV Solution involving Amphotericin with NACL 0.9%, the wrong combination. The patient died four hours after being administered the said IV Solution. Respondent Johnson was not fired for the said incident. He remained in a position of authority. It was he who "constructively fired" the petitioner. By respondent Suburban permitting respondent Johnson to remain in a position of authority after his involvement in the said IV Solution incident, created "disparate impact" and "disparate treatment" against the petitioner. The petitioner became a victim of "cruel and unusual punishment," a violation of the Eighth Amendment. Punishment given to petitioner same as that given to respondent Johnson.

In *Bob Jones University v. United States*, Docket No. 81-3, Argued October 12, 1982, Decided May 24, 1983, the Court held:

"It would be wholly incompatible with the concepts underlying tax exemption to grant tax-exempt status to racially discriminatory *private educational entities.*" The tenet of Law enunciated in *Bob Jones* is applicable to the instant case. William T. Coleman, Jr., pro se, by invitation of the Court, 456 U.S. 922, argued the *Bob Jones* cause as *amicus curiae* urging affirmance. In *Board of Directors of Rotary International, et al. v. Rotary Club of Duarte, et al.*, Supreme Court Docket No. 86-421, argued March 30, 1987, decided May 4, 1987, the Court

held: "The State has compelling interests in eliminating discrimination . . . ." In *Burning Tree Club, et al. v. State of Maryland, et al.*, Supreme Court Docket No. 88-1970, the Court denied Certiorari, thus denied "freedom of association" to practice discrimination–sexual. The above Decisions make it abundantly clear that private institutions practicing discrimination are prohibited from receiving federal financial assistance. The Civil Rights Restoration Act specifically denies Federal assistance to institutions practicing discrimination. The Civil Rights Restoration Act reinforces the case of the petitioner.

B. INSTITUTION VIOLATES THE CONTRACT OF PETITIONER

The contract clause remains a part of the written Constitution. The contract clause is applicable to private obligations.

Allied Structural Steel Co. v. Spannous, 438 U.S. 234 (1978). When the respondents suspended the petitioner, his Contract was violated. The Contract has no provision for suspension. The suspension was therefore a "constructive firing." The Contract provides for a 30-day notice. By breaching petitioner's Contract, respondents' actions became intentional malicious, and grossly negligent. Therefore, the petitioner is entitled to Punitive and Compensatory damages with no duty to mitigate.

Lundgren v. Freeman, 307 F.2d 104 (CA 9, 1962). The statement in the Contract "I enjoy all benefits of full time employees . . . ." covers behavior before the

Contract, during the Contract, and after the Contract. Benefits are:

1. Retirement Annuity
2. Social Security
3. Tuition Assistance
4. Sick Leave
5. Bereavement Leave
6. Life Insurance
7. Health Insurance
8. Work in non-hostile environment
9. Equality of pay
10. Non-discrimination
11. Seniority preference for promotion
12. Night differential pay

The behavior is based on the original Contract.

II. INSTITUTION EXPOSED PETITIONER TO CARCINOGENIC SUBSTANCES

Documentary evidence shows that respondents operated the Chemo Hood (biological safety cabinet) not in agreement with the National Study Commission on Cytoxic Exposure Recommendations for handling Cytotoxic Agents (Appendix P, p. 48a) (Appendix O, p. 47a Chemo Orders of Suburban). Moreover, the petitioner was injured by the Chemo Hood at Suburban, necessitating emergency treatment at Suburban. Respondent Suburban failed to operate the biological safety cabinet with the blower on 24 hours per day for seven days per week. Respondent Suburban failed to provide disposable garments. Therefore, being exposed to Carcinogenic Agents by respondent Suburban, petitioner is entitled to damages predicated on "seriousness" of future consequences.

The instant case is analogous to:

(a) Agent Orange Issue, *Washington Post*, September 18, 1986

(b) Asbestos Cases, *Parade* Magazine, October 12, 1986

(1) *U.S. v. Metate Asbestos Corp.*, DC Ariz, 584 F.Supp. 1143, 1146

(2) *Hammond V. North American Asb. Corp.*, 435 N.E.2d 540

(c) W.R. Grace & Co. Polluting water supply with Carcinogenic Agents. Toxic waste settlement reached. *Wash. Post*, Sept. 23, 1986

(d) *Ortho v. Wells*, Supreme Court let stand damages awarded in birth defects. *Wash. Post*, September 23, 1986.

(e) *A.H. Robins Co. v. Dept. of Health*, 130 Cal. Rptr. 901, 87 S.Ct. 1110

Handler of product is entitled to recover for injury sustained while doing act that is both foreseeable and necessary in putting product to its ultimate intended use.

Simpson Timber Co. v. Parks, 369 F.2d 324, 89 S.Ct. 130, 393 U.S. 858

III. FOR JUDICIAL ECONOMY ALL ISSUES SHOULD BE HEARD BY A SINGLE COURT, ISSUES HAVING ARISES FROM COMMON NUCLEUS OF CIRCUMSTANCES

The Doctrine of Pendent Jurisdiction, 383 U.S. 715, is applicable in the instant case. Moreover, respondents shifted more carcinogenic preparations to the night shift on which petitioner worked.

The position of Night Shift Pharmacist automatically becomes one of pre-eminence. He is the only licensed pharmacist on duty for the said period of time. Without his being on duty with his license, the pharmacy department could not legally dispense medications. Respondent Suburban, by paying petitioner a lower base salary than the said white pharmacists, exploited the petitioner as well as illegally discriminated against him.

The Fourth Circuit Court of Appeals erred in assuming no pharmacy shortage. A recent document submitted for the Rehearing Petition contradicts the assumption of no pharmacy shortage. The Fourth Circuit erred by not having "seniority" system prevail. Neither a Pharm.D. nor a J.D. were prerequisites for advancement for some people. To require a Pharm.D. Degree for the petitioner is discriminatory against him. The District Court of Maryland and the Fourth Circuit erred by not accepting the Statement of the Board of Pharmacy of Maryland concerning the date that one of the white pharmacists became licensed to practice pharmacy in Maryland.

Other Black pharmacists have found it necessary to sue respondent Suburban.

Night Differential Pay is based on the time of work.

Physician Veronica Prego with AIDS takes her case to trial—*Wash. Post*, January 7, 1990. She is suing for 175 million dollars.

CONCLUSION

For the foregoing reasons, this Court should grant this petition and review the decision of the Fourth Court of Appeals on the issues raised herein.

Respectfully submitted,

JAMES G. WALKER, R.Ph., J.D.
1412 Whittier Place, N.W.
Washington, D.C. 20012
(202) 723-0593
(301) 565-5960
Petitioner Pro Se.

January 31, 1990

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. JH-86-962

JAMES GEORGE WALKER

v.

SUBURBAN HOSPITAL ASSOCIATION, et al.

ORDER

Having reviewed the record in the above-styled complaint, filed *pro se,* fee paid, on March 24, 1986, it is this 7th day of April, 1986,

ORDERED:

1) That the Clerk withhold issuance of process until the plaintiff files an amended complaint in conformity with paragraph (2), below.

2) That plaintiff file an amended complaint, with the following particular changes:

(a) deletion of paragraphs 1(b) and 1(c) – references to superseded statutes;

(b) clarification of paragraph 1(d) – declaration of basis of jurisdiction;

(c) deletion of paragraphs 1(e) and 1(f) – reference to sections of the federal criminal code which can only be prosecuted by the Office of the United States Attorney; and

(d) clarification of paragraph 1(h) and the complaint in general – reference to Title VII (42 U.S.C. § 2000 *et seq.*), where there is no allegation of the basis of discrimination (e.g., race, sex, religion, national origin, etc.), nor any indication that plaintiff has timely processed these

complaints through the Equal Employment Opportunity Commission or an appropriate state agency. This amended complaint shall be filed on or before May 4, 1986, failing which this case will be dismissed without prejudice.

3) That the Clerk mail a copy of this Order to plaintiff forthwith.

/s/ Joseph C. Howard
Joseph C. Howard
United States District Judge

[Filed April 8, 1986]

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF MARYLAND
AT BALTIMORE

CA No. JH-86-962

1. James George Walker,

Plaintiff

v.

1. Suburban Hospital Association, et al

Defendants

FILING OF AMENDED COMPLAINT

1. The Amended Complaint is hereby filed.
2. Plaintiff prays that the processing of the Amended Complaint will go forth immediately.
3. The need to make discovery as soon as possible is essential.

POINTS AND AUTHORITY

1. Title 28, USC, Section 1653
2. Federal Rules of Civil Procedure: Rule 26, Rule 31, Rule 32, Rule 33, Rule 34.

/s/ James G. Walker
James G. Walker, R.Ph., J.D.

Personally delivered to the Office of the Clerk,
April 16th, 1986

/s/ James G. Walker
James G. Walker

[Filed April 16, 1986]

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF MARYLAND
AT BALTIMORE

CA NO. JH-86-962

1. James George Walker
   1412 Whittier Place, N.W.
   Washington, D.C. 20012
   Resident (202) 723-0593

   7849 Eastern Avenue
   Silver Spring, Md. 20910
   Business (301) 565-5960

Plaintiff

v.

1. Suburban Hospital Association, et al
   8600 Old Georgetown Road
   Bethesda, Maryland 20814

2. Joan Finerty
   Suburban Hospital
   8600 Old Georgetown Road
   Bethesda, Maryland 20814

3. Paul Quinn
   Suburban Hospital
   8600 Old Georgetown Road
   Bethesda, Maryland 20814

4. James Gary
   Suburban Hospital

8600 Old Georgetown Road
Bethesda, Maryland 20914

5. Bernadette Welch
Suburban Hospital
8600 Old Georgetown Road
Bethesda, Maryland 20814

6. Charles Stewart
Suburban Hospital
8600 Old Georgetown Road
Bethesda, Maryland 20814

7. Lloyd Green
Suburban Hospital
8600 Old Georgetown Road
Bethesda, Maryland 20814

8. Dalton Williamson
3108 Brightseed Road
Landover, Maryland

9. Eric E. Johnson
9809 Whiskey Run
Laurel, Maryland 20702

10. Heidi Christl Marchand
10225 Kensington Parkway
Kensington, Maryland

11. Aester Hailu
8812 Lanier Drive
Silver Spring, Maryland

Defendants

AMENDED COMPLAINT FOR DAMAGES RESULTING FROM: DISCRIMINATION, HARASSMENT, UNNECESSARY EXPOSURE TO HARMFUL CARCINOGENIC SUBSTANCES, BREACH OF CONTRACT; AND TO RECOVER BACK PAY

1. Jurisdiction of this cause arises under: (a) Title 42, United States Code Section 1983 - Civil Actions for deprivation of rights.

(b) Title 42, USC, Section 1981, Section 1982, and Section 1985 - Equal rights, Property rights, Conspiracy to interfere with civil rights.

(c) Title 28, USC, Section 1331 - Federal Question, District Court has jurisdiction. (Awarding damages for violation of Civil Rights?)

(d) Title 28, USC, Section 1343(a)(1)(2)(3)(4) - Recover damages.

(e) Title 28, USC, Section 1391(b) - Venue

(f) Fourteenth Amendment of the Constitution of the United States - Due process of law, equal protection of the law.

(g) Fifth Amendment of the Constitution of the United States - Taking property without due process.

(h) Title VII, Equal Employment Opportunity of 1964 Civil Rights Act (Title 42, USC, Section 2000) - Racial discrimination: Plaintiff, a black pharmacist, paid a lower salary than white pharmacists. (District Court is empowered to separate substance from form.)

(i) General Equity powers of the Court.

2. Plaintiff, James G. Walker was hired by Suburban as a Pharmacist April 29, 1984.

3. On May 16, 1984 the Contract for his position as Night Pharmacist at Suburban was signed. (Plaintiff's Contract)

4. The Contract specifies a "minimum" of 30 days notice for discontinuing the service of Plaintiff by Suburban.

5. On October 30, 1985 Defendant Heidi Marchand placed an accusatory statement in a file being maintained on the Plaintiff. The Plaintiff had no opportunity to defend against this action or to rebutt the contents of the statement.

6. Defendant Marchand, a white Pharmacist, was hired August 13, 1984 at a salary higher than the salary of the Plaintiff.

7. Defendant Marchand was given a retroactive pay raise dating back to October 21, 1984.

8. A white Pharmacist was hired March 20, 1985 at a salary higher than the salary of the Plaintiff.

9. Another white Pharmacist was hired May 30, 1985 at a salary higher than the salary of the Plaintiff.

10. Another white Pharmacist was hired July 15, 1985 at a salary higher than the salary of the Plaintiff.

11. Another white person was hired September 9, 1985 as a Pharmacist at a salary higher than the salary of the Plaintiff. Apparently, this person did not have a Maryland Pharmacy License at the time of the said hiring.

* * * The actions taken by Suburban in Paragraphs 6 through 11 violates the tenor of Law enunciated in *McDaniel v. Board of Public Instruction for Escambia County, et al.*, Fla. 39 F. Supp. 638.

12. On or about September 23, 1985 the Plaintiff wrote Defendant James Gary concerning the hazardous working conditions with carcinogenic substances, the apparent disparity in pay among the Pharmacists, and the

disparity in night differential pay for some workers at Suburban and evening differential pay for the Night Pharmacist.

13. On January 8, 1986 about 7:30 A.M, Defendant Eric Johnson came out of the Sterile Process Room (IV) and said to the Plaintiff: "we are cracking down on coding. Here." (Codes for the said card were in the room from which he had just departed). The Plaintiff was writing P.O. orders in the patient's profiles at the time. A white technician, who happened to be in the P.O. room at the time was told by the Plaintiff to put the code on the card. She said "no", "I am in the other room."

14. Defendant Dalton Williamson was told of the sequence of events in paragraph 13. Williamson said to the Plaintiff, "you must put the code on the card and you are not the technician's supervisor and will not be her supervisor as long as I am here."

15. On January 9, 1986 a meeting was held among the Plaintiff and Defendants Gary and Williamson concerning the events in paragraphs 13 and 14.

16. Defendant James Gary refused to examine evidence concerning other pharmacists not executing code cards.

* * * By charging the Plaintiff and not charging others, the tenor of law enunciated in, *Yick Wo v. Hopkins*, 118 U.S. 356, is violated.

17. At the end of the said meeting in the office of Defendant James Gary, Defendant Williamson gave the Plaintiff a document. This document had been prepared before the said meeting.

* * * Because this contumely document had been prepared before the said meeting, Due Process was violated. The outcome has been pre-determined.

18. By Plaintiff's document dated January 9, 1986, Defendant Paul Quinn was informed of the events in paragraphs 13 through 17.

19. By Plaintiff's letter January 24, 1986, Defendant Quinn was informed that his response was totally lacking in specificity.

20. Defendant Quinn appeared to be indicating that he and Defendant Bernadette Welch agreed with the action of pharmacy management.

21. With no response to Plaintiff's letter of January 24, 1986, Plaintiff informed Defendant Joan Finerty by letter February 7, 1986, that in due time a Complaint would be filed in the United States District Court for the District of Columbia.

22. On February 5, 1986, Defendant Aester Hailu attempted to compel the Plaintiff to sign a document on responsibilities.

23. On February 19, 1986, Defendant Eric Johnson remarked to the Plaintiff "you are incompetent." Plaintiff James G. Walker reminded Defendant Eric Johnson of the incident in which Defendant Eric Johnson is alleged to have prepared on May 26, 1985, Amphotericin with NACL 0.9% The patient died four hours after being administered the said solution.

24. On February 21, 1986, Defendant Eric Johnson gave Plaintiff a document indicating suspension of the Plaintiff. Defendant Bernadette Welch confirmed the suspension of the Plaintiff.

* * * This suspension is a violation of the Contract of the Plaintiff.

25. On February 21, 1986 Plaintiff was informed that Defendant Charles Stewart is Assistant Administrator in

charge of Finance and that Defendant Lloyd Green is the Supervisor of Defendant Bernadette Welch.

26. Plaintiff was not paid night differential pay: others were.

27. Factual documentation became known to the Plaintiff in December 1985, during the moving displacement in the Pharmacy Department.

Wherefore, Plaintiff respectfully prays for the following relief:

1. That Suburban Hospital Association award Plaintiff one hundred million dollars ($100,000,000.00) in punitive and compensatory damages for having discriminated against him and for the seriousness of future consequences of his being exposed to hazardous carcinogenic substances.

2. That Suburban Hospital Association remain liable for the life span of the Plaintiff for any and all payments for the cancer that he may come down with.

3. That Suburban Hospital Association remain liable for the life span of any and all offspring of the Plaintiff for any and all payments for the cancer that they may come down with.

4. That Suburban Hospital Association award Plaintiff fifty thousand dollars ($50,000.00) in back pay, having discriminated against him in salary, night differential, and breaching the Contract.

* * * *Hishon v. King*, 104 S.Ct. 2229 (1984)

"a benefit that is part and partial of the employment relationship, even though it is not required by express or implied contract may not be doled out in a discriminatory fashion."

5. That Defendant Dalton Williamson award the Plaintiff fifteen million dollars ($15,000,000.00) for punitive

and compensatory damages for harassment, conspiracy to deprive Plaintiff of rights, privileges, and immunities.

6. That Defendant Eric Johnson award Plaintiff fifteen million dollars ($15,000,000.00) for punitive and compensatory damages for harassment, conspiracy to deprive Plaintiff of rights, privileges, and immunities.

7. That Defendant Heidi Marchand award the Plaintiff fifteen million dollars ($15,000,000.00) for punitive and compensatory damages for harassment, conspiracy to deprive Plaintiff of rights, privileges, and immunities.

8. That defendant Aester Hailu award Plaintiff fifteen million dollars for punitive and compensatory damages for harassment, conspiracy to deprive Plaintiff of rights, privileges, and immunities.

9. That Defendants: Joan Finerty, Paul Quinn, James Gary, Bernadette Welch, Charles Stewart, and Lloyd Green each award the Plaintiff fifteen million dollars ($15,000,000.00) for their failure to prevent and for their aiding and abetting: harassment, discrimination, conspiracy, unequal application of Hospital rules, breach of contract, and hazardous working conditions.

10. For such other, further, and different relief as the Court may seem just and property.

Respectfully submitted,

James George Walker, R.Ph., J.D.

Pro Se

APPENDIX D

[Filed May 26, 1987]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. JH-86-962

JAMES GEORGE WALKER

Plaintiff

v.

SUBURBAN HOSPITAL ASSOCIATION, et al.,

Defendants

MEMORANDUM

Pending before the Court is plaintiff's *pro se* civil rights complaint alleging racial discrimination and brought against Suburban Hospital Association and others. The immediate matters for consideration are plaintiff's objections to two Reports and Recommendations issued by United States Magistrates Daniel E. Klein, Jr. on February 27, 1987, and Deborah K. Chasanow, on April 29, 1987.

Upon review of what appears to be thirty-seven objections to the reports of the Magistrates, the Court notes that none defeat the Magistrates' findings that 42 U.S.C. §1982 is inapplicable to employment discrimination; that plaintiff's Title VII claim must first be brought before the Equal Employment Opportunity Commission for this Court to have jurisdiction; that defendants are not state actors regardless of the receipt of the Hill-Burton Act or medicare and medicaid funds; that Title VII provides an exclusive remedy for employment discrimination; that the contract clause is a limit upon the state and not private actors; and that plaintiff fails to

state a jurisdictional basis for his tort claim. Accordingly, the Court will adopt the Report and Recommendations of the Magistrates by separate Order.

/s/ Joseph C. Howard
Joseph C. Howard
United States District Judge

Date: May 22, 1987

[Filed May 26, 1987]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. JH-86-962

JAMES GEORGE WALKER,

Plaintiff

v.

SUBURBAN HOSPITAL ASSOCIATION, et al.,

Defendants

ORDER

In accordance with the Court's Memorandum of even date adopting the Report and Recommendations of Magistrates Daniel E. Klein, Jr. and Deborah K. Chasanow, it is this 22nd day of May, 1987, by the United States District Court for the District of Maryland, ORDERED:

1) That plaintiff's claims based on 42 U.S.C. §§1981 and 1985(3) and plaintiff's contract and tort claims BE, and the same hereby ARE DISMISSED;

2) That partial summary judgment BE, and the same hereby IS, GRANTED for the defendants as to plaintiff's claims based on 42 U.S.C. §1983 and the fifth and fourteenth amendments;

3) That plaintiff's 42 U.S.C. §1982 and Title VII claims BE, and the same hereby ARE, DISMISSED; and

4) That the Clerk mail copies of the Court's Memorandum and of this Order to all counsel of record.

/s/ Joseph C. Howard
Joseph C. Howard

United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-3117

JAMES GEORGE WALKER,
Plaintiff-Appellant

v.

SUBURBAN HOSPITAL ASSOCIATION; JOAN FINERTY; PAUL QUINN; JAMES GARY; BERNADETTE WELCH; CHARLES STEWART; LLOYD GREEN; DALTON WILLIAMSON; ERIC E. JOHNSON; HEIDI CHRISTL MARCHAND; AESTER HAILU,
Defendants-Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph C. Howard, District Judge. (C/A No. 86-962)

Submitted: January 29, 1988 Decided: March 25, 1988

Before HALL, PHILLIPS, and CHAPMAN, Circuit Judges.

(James George Walker, Appellant Pro Se. John Gregory Kruchko, Kathleen A. Talty, Kruchko & Fries, for Appellees.)

PER CURIAM:

Plaintiff James Walker sued his former employer, Suburban Hospital Association, and ten other named defendants on claims under 42 U.S.C. §§1981, 1982, 1983 and 1985; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*; and the fifth and fourteenth amendments. He also brought pendent state claims for breach of contract and harmful exposure to carcinogens. The district court entered judgment for the defendants, and

Walker appeals. We affirm the judgment for the defendants on the claims based on 42 U.S.C. §§1981, 1982, and 1985(3), Title VII and the fifth and fourteenth amendments on the reasoning of the district court. However, for the reasons discussed below, we reverse the judgment for the defendants on the §1981, contract, and tort claims, and remand the case for further proceedings.

1. *Exclusivity of Title VII*

The district court ruled that Walker was barred from bringing an action for race discrimination in employment under 42 U.S.C. §1981 because Title VII provides the exclusive remedy for discriminatory employment practices that allegedly violate rights set forth in Title VII. There is a split in the decisions concerning whether a suit under Title VII precludes a simultaneous suit under §1981 based on the same operative facts. Some courts adhere to the rule that unless separate and distinct rights are being litigated, an aggrieved employee may not seek relief by way of the concurrent assertion of a Title VII claim and a claim based on a violation of §1981. *See, e.g., Watson v. Ft. Worth Bank and Trust,* 798 F.2d 791, 794 n.4 (5th Cir. 1986); *Tafoya v. Adams,* 612 F. Supp. 1097 (D. Colo, 1985); *Ramirez v. Burn,* 607 F. Supp. 170 (S.D. Tex. 1984); *Hudson v. Charlotte Country Club, Inc.,* 535 F. Supp. 313 (W.D.N.C. 1982). The rationale for the rule has been that when the factual setting of the substantive claims of employment discrimination brought under Title VII parallels that of the claims grounded on §1981, a plaintiff should not be allowed to circumvent the detailed provisions and structural integrity of Title VII by asserting a concurrent action based on §1981. Other courts, however, adhere to the view that an employee can pursue a cause of action under §1981 for private employment discrimination despite the applicability

of Title VII to the same conduct. *See e.g., Mead v. Merchants Fast Motorline Inc.*, 820 F.2d 1124 (10th Cir. 1987); *Lowe v. City of Monrovia*, 775 F.2d 998 (9th Cir. 1985); *Gooding v. Warner-Lambert Co.*, 744 F.2d 354 (3d Cir. 1984); *Gunby v. Pennsylvania Electric Co.*, 631 F. Supp. 782 (W.D. Pa. 1985); *Evans v. Central of Georgia Railroad Co.*, 619 F. Supp. 1364 (N.D. Ga. 1985).

We believe the Supreme Court's decision in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), as explained in *Brown v. General Services Administration*, 425 U.S. 820 (1976), controls the issue[3] and permits the §1981 cause of action asserted by Walker. *See Keller v.*

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[3] In support of its conclusion that Title VII provides the exclusive remedy for discriminatory employment practices that violate Title VII rights, the district court cites to Tafoya v. Adams, 612 F. Supp. 1097 (D. Colo. 1985) and Parson v. Kaiser Aluminum Corp., 727 F.2d 473 (5th Cir.), *cert. denied*, 467 U.S. 1243 (1984). In *Tafoya* the district court was concerned, *inter alia*, that the litigants would use §1981 to bypass Title VII's administrative procedures and to bring time-barred claims. To the extent that the district court concluded that plaintiffs should not be permitted to "bypass" the procedure required under Title VII merely by including a cause of action under §1981, the Supreme Court in *Johnson* acknowledged that the procedures for relief under §1981 and Title VII were at odds with each other and that the filing of a §1981 suit would weaken the administrative process mandated by Title VII. While sympathetic to this concern, the Court reasoned nevertheless, that these difficulties were the byproduct of Congress' choice to make available multiple remedies against employment discrimination.

The court in *Parson* ultimately traces its authority for the proposition that Title VII preempts a concurrent §1981 action to Rivera v. City of Witchita Falls, 665 F.2d 531 (5th Cir. 1982). In *Rivera*, the Fifth Circuit held that consideration of §1981 and §1983 claims, as alternative remedies, is only necessary if their violation can be made out on different grounds from those available under Title VII. The court's opinion offers no explanation or citation for this proposition.

Prince George's County, 827 F.2d 952 (4th Cir. 1987). In *Johnson*, the Supreme Court held that Title VII is not the exclusive remedy for claims of employment discrimination in the private sector and that an aggrieved person could pursue remedies under Title VII and §1981 simultaneously. *Johnson*, 421 U.S. at 460-61. The Court's holding was derived primarily from an examination of the legislative history of Title VII, which demonstrated that Congress intended to allow aggrieved persons to independently pursue their rights under both Title VII and other applicable state and federal statutes. The *Johnson* Court stated that:

> Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief.

Id. at 459. *See also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974) ("Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.") The Court concluded that "Congress clearly has retained §1981 as a remedy against private employment discrimination separate from and independent of the more elaborate and time-consuming procedures of Title VII."[4] 421 U.S. at 466.

---

[4] Although *Johnson* specifically holds only that a claimant's pursuit of administrative remedies under Title VII does not toll the running of the limitations period for an associated action under §1981, this Court has recognized *Johnson* as establishing the principle that Title VII does not preempt an employment discrimination suit against a private employer brought under §1981. *See* Keller v. Prince George's County, 827 F.2d 952 (4th Cir. 1987).

In *Brown* the Supreme Court held that, unlike a private employee, a federal employee may not maintain a §1981 suit against the United States based on a claim of intentional discrimination in employment. 425 U.S. at 835. The Court distinguished *Johnson* noting as follows:

> The Petitioner relies upon our decision in *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), for the proposition that Title VII did not repeal pre-existing remedies for employment discrimination. In *Johnson* the Court held that in the context of *private employment* Title VII did not pre-empt other remedies. But that decision is inapposite here. In the first place, there were no problems of sovereign immunity in the context of the *Johnson* case. Second, the holding in *Johnson* rested upon the explicit legislative history of the 1964 Act which " 'manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.' " Congress made clear " 'that the remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. §1981, and that the two procedures augment each other and are not mutually exclusive.' " *See also Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 415-417 (1968). There is no such legislative history behind the 1972 amendments. Indeed, as indicated above, the congressional understanding was precisely to the contrary.

Id. at 833-34 (citations omitted) (emphasis in original).

We are of the opinion that, with respect to claims of private employment discrimination, *Johnson* compels the conclusion that Title VII does not provide the exclusive remedy and that plaintiff may seek relief under

§1981. Accordingly, we reverse the district court's dismissal of plaintiff's §1981 claim.

2. *The State Tort and Contract Claims*

After disposing of the federal issues the district court concluded that it lacked jurisdiction over Walker's contract and tort claims. Walker claimed that the defendants exposed him to carcinogens and suspended him in violation of his employment contract. Both claims derive from the same employment context which gave rise to the §1981 claim. As the state and federal claims derive from a common nucleus of operative fact, should the district court determine on remand that the §1981 claim presents substantial federal issues, it would have pendent jurisdiction to hear the state claims. *United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966). Accordingly, we remand the state claims as well as the §1981 claim to the district court. We dispense with oral argument because the facts and legal contentions are adequately developed in the materials before the Court and argument would not aid the decisional process.

AFFIRMED IN PART,
REVERSED IN PART
AND REMANDED

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF MARYLAND
AT BALTIMORE

C.A. No. JH-86-962

JAMES G. WALKER,

Plaintiff

v.

SUBURBAN HOSPITAL ASSOCIATION, et al.,

Defendants

PROPOSED INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS UNDEP RULE 26 AND RULE 34 AND RULE 33

Plaintiff James G. Walker requests defendant Joan Finnerty to respond within 30 days to the following requests:

1. That defendant produce the following documents:

(a) Home addresses of all defendants

(b) Promotion policy signed by Joan Finnerty 5-27-82

(c) Resignation letter of Eric E. Johnson dated 5/21/85

(d) Document dated September 16, 1985 returned to James Gary by James G. Walker concerning changes to take place the Pharmacy

(e) Personnel List of Pharmacy delineated by Race from April 1, 1984 to May 31, 1986 with ADJ, Hire, Base Pay

(f) Letter of Heidi A. Christl Marchand to Roberti Conti dated January 28, 1985 concerning retroactive pay October 15, 1984

(g) Document granting Heidi Christl Marchand retroactive pay dated 2/13/85

(h) Counseling Memo to Dalton Williamson dated 5/8/85

(i) Educational Assistance Request Form Z of Eric Johnson dated 1/8/85

(j) Employment Agreement – Night Pharmacist – signed by James G. Walker May 16, 1984

(k) Letter dated 10/30/85 of Heidi Marchand in which the name of James G. Walker is mentioned

(l) Counseling Memo to Eric Johnson dated 5/2/85 indicating suspension of Eric Johnson for incorrect IV fluid dispensed (Amphotericin in NACL 0.9% 250 ml)

(m) Report on IV Incident dated 5/3/85 about Amphotericin in NACL 0.9% 250ml, concerning Eric Johnson

(n) List of pay roll of persons delineated by Race receiving night differential pay from April 1, 1984 to May 31, 1986

(o) List of pay roll of persons delineated by Race receiving evening differential pay from April 1, 1984 to May 31, 1986

(p) File maintained on James G. Walker

(q) List of College Degrees delineated by Race of all Pharmacy employees from April 1, 1984 to May 31, 1986

2. What performances did you take in any and all matters pertaining to James G. Walker?
3. Who advised you to take the said performances pertaining to James G. Walker?
4. What is the definition of "night differential pay"?
5. What is the definition of "evening differential pay"?
6. Does Suburban Hospital receive Federal Funds?

7. Does Suburban Hospital receive State Funds?
8. Under what Acts does Suburban Hospital receive the said funds?
9. Is defendant Eric Johnson still employed at Suburban?
10. Is defendant Dalton Williamson still employed at Suburban?
11. When did defendant Eric Johnson cease being employed at Suburban?
12. When did defendant Dalton Williamson cease being employed at Suburban?
13. Why was the employment of defendants Eric Johnson and Dalton Williamson terminated?
14. From April 1, 1984 to May 31, 1986 what amount of Federal Funds did Suburban receive?
15. From April 1, 1984 to May 31, 1986 what amount of State Funds did Suburban receive?
16. For the said dates what is the percent of Federal Funds received by Suburban?
17. For the said dates what is the percent of State Funds received by Suburban?
18. Have any other defendants ceased being employed at Suburban?
19. Why was defendant James Gary, a non Pharmacist, placed as Acting Director of the Pharmacy Department at Suburban?
20. While acting as Director of Pharmacy, did James Gary reduce the salary of a white Pharmacist?
21. Why was the salary of the said Pharmacist reduced?

22. Was the reduced salary of the said Pharmacist still higher than the salary of Plaintiff James G. Walker? (Base pay)

23. From April 1, 1984 to May 31, 1986 was at any time a white person hired as Pharmacist without possessing a Maryland Pharmacy License? (Hired at Suburban and worked without the Md. License)

24. Was the salary of the said person without the Maryland Pharmacy License higher than the salary of Plaintiff James G. Walker? (Base pay)

25. Were other white Pharmacists hired subsequent to Plaintiff James G. Walker with base salaries higher than the base salary of the plaintiff? (Each base salary of each white Pharmacist)

26. Did another white Pharmacist submit a letter to defendant Dalton Williamson refusing to work in the PO Section?

27. Was the salary of the said white Pharmacist reduced?

28. Was the salary of the said white Pharmacist greater than salary of the plaintiff James G. Walker? (Base pay)

This is to certify that the foregoing was mailed, postage prepaid June 2, 1986 to:

1. Ms Joan Finnerty
   8600 Old Georgetown Road
   Suburban Hospital
   Bethesda, Maryland 20814

2. Law office of John G. Kruchko
   28 West Alleghany Ave.
   Suite 606
   Baltimore, Md. 21204

/s/James George Walker R.Ph., J.D.
James G. Walker, R. Ph., J.D.

This is to certify that the foregoing was hand delivered to: June 2, 1986

Office of Clerk
101 W. Lombard Street
United States District Court
Baltimore, Md.

/s/James George Walker, R.Ph., J.D.
James G. Walker, R. Ph., J.D.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF MARYLAND
AT BALTIMORE

CA No. JH-86-962

JAMES G. WALKER,

Plaintiff

v.

SUBURBAN HOSPITAL ASSOCIATION, et al.,

Defendants

PLAINTIFF'S MOTION TO COMPEL DEFENDANT JOAN FINNERTY TO ANSWER INTERROGATORIES AND TO PRODUCE DOCUMENTS AND FOR SANCTIONS AGAINST DEFENDANT FINNERTY FOR NOT ANSWERING AND NOT PRODUCING THE SAID REQUESTS

Plaintiff's proposed Interrogatories and request for production of Documents are for admissable evidence.

DOCUMENTS

1(a) Home addresses of all Defendants. The Document "Suburban Hospital Association – Application For Employment" should contain the requested information.

1(c) Resignation letter of Eric E. Johnson dated 5/21/85.

1(d) Document dated September 16, 1985, returned to James Gary by James G. Walker concerning changes to take place in the Pharmacy.

1(e) Personnel List of Pharmacy delineated by race from April 1, 1984 to May 31, 1986 with ADJ, HIRE, BASE PAY.

1(h) Counseling Memo to Dalton Williams dated 5/8/85.

1(j) Education Assistance Request Form Z of Eric Johnson dated 1/8/85.

1(l) Counseling Memo to Eric Johnson dated 5/2/85 indicating suspension of Eric Johnson for incorrect I.V. fluid dispensed (Amphotericin in NACL 0.9% 250 ml).

1(m) Report on I.V. Incident dated 5/3/85 about Amphotericin in NACL 0.9% 250 ml, concerning Eric Johnson.

1(n) List of payroll of persons delineated by race receiving night differential pay from April 1, 1984 to May 31, 1986.

1(o) List of payroll of persons delineated by race receiving evening differential pay from April 1, 1984 to May 31, 1986.

1(p) File maintained on James G. Walker including 1(d) – document to James Gary.

1(q) List of College Degrees delineated by race of all pharmacy employees from April 1, 1984 to May 31, 1986.

INTERROGATORIES

No. 14 From April 1, 1984 to May 31, 1986 what amount of Federal Funds did Suburban receive?

No. 15 From April 1, 1984 to May 31, 1986 what amount of State Funds did Suburban receive?

No. 16 With the said dates, what is the percent of Federal Funds received by Suburban?

No. 17 With the said dates, what is the percent of State Funds received by Suburban?

No. 22 Was the reduced salary of the said pharmacist still higher than the salary of Plaintiff James G. Walker? (Base Pay)

No. 24 Was the salary of the said person without the Maryland Pharmacy License higher than the salary of Plaintiff James G. Walker?

No. 25 Motion to strike "with greater experience levels than Plaintiff James G. Walker."

No. 27. Was the salary of the said white Pharmacist reduced?

No. 28 Was the salary of the said white Pharmacist greater than the salary of the Plaintiff James G. Walker?

Respectfully submitted,

James G. Walker, R. Ph., J.D.
(202) 723-0593 1412 Whittier Place, N.W.
Business (301) 565-5960 Washington, D.C. 20012

This is to certify that the foregoing Motion To Compel Defendant Joan Finnerty was mailed June 8, 1988 postage prepaid to:

1. Office of the Clerk
   101 W. Lombard Street Room 409
   United States District Court
   Baltimore, Maryland 21201

2. Law Office of John Kruchko
28 West Alleghany Ave. Suite 606
Baltimore, Maryland 21204

James G. Walker, R. Ph., J.D.

APPENDIX H

SUBURBAN
HOSPITAL
ASSOCIATION
8600 Old Georgetown Road Bethesda, Maryland 20814
301/530-3100

REPORT ON IV INCIDENT

5-3-85

4-29-85 – Notified for the first time by Aman, evening pharmacist, of an IV incident that took place on Friday, May 26, 1985. It appeared that Amphotericin had been mixed with NaCl 0.9% in a 250 ml. bag instead of the labeled Dextrose 5% in Water in a 250 ml. bag. I asked him as to who made the IV-Admixture. He stated that Eric had made the Admixture. My first thought was to the whereabouts of an incident report. After some further investigation, I found out that Quinn Burwell looked at the prepared IV-Admixture on the floor. Mr. Burwell is a technician, not a pharmacist. The patient was in isolation and the incorrect solution was re-prepared and administered. Since the patient was in isolation, the incorrect solution (evidence) was destroyed. I talked with Eric Johnson about the situation. He stated that he did not prepare any Amphotericin Solutions and that he did not remember checking any prepared solutions. He remembers taking a prepared solution to the floor for this patient, as the original order had been for and prepared in 50 or 100 ml. of solution. This volume of the solution was changed by him on the patient's chart to 250 ml. after conferring with the physician. By this time, it was

late in the day. I deferred any further investigation until the next day.

4-30-85 – On Tuesday, I determined that there had been no incident report filed. As to the reason why not, I don't know. I was also notified by Mr. Kochhar of the incident. I then asked Heidi Christl to go look at the chart, since the patient had expired. The patient had been at death's door for the week, and there was a notification of the incorrect solution. I conferred with Jon Dorcas, pharmacist, about the situation. He stated that he might have OK'd a solution. I conferred with Rosemary Armah and Chris Lively, technicians on IV duty for the day. Rosemary stated that she made no solutions containing amphoterician. Chris stated that he had made some during the day, but that he did not remember any by that patient. I then went to see Bernie Welch, Director of Personnel, concerning the situation. I related to her the fact that Amphotericin was potentially incompatible with NaCl 0.9%, but not Dextrose 5%. There had been no incident report filed, but that I knew the identity of the nurse. I also gave her all of the known facts as of that moment. She related to me that I would have to get in contact with the nurse. I returned to the pharmacy, checked with the floor where the nurse works, and discovered that the nurse was off and would return to work on Wednesday.

5-1-85 – On Wednesday morning, I sent a note to Ms. Roberta Conti, Assistant Administrator, about the potential problem. I went to see Ms. Cecilia Jimenez to find out the phone number of the nurse in question. At this point in time, the incident had been disclosed. Mr. Jimenez called the nurse. She related to the nurse that an incident report would have to be filed with Risk Management when she reported to work, and that I would

like to talk with her. Upon quizzing her, she stated that the nurse on the IV team had been called to look at the IV because of the decreasing flow of the IV into the patient. It was at this point that the IV nurse discovered the potential problem. The regular nurse notified that Pharmacy of the problem, whereas Aman, the Pharmacist on duty, related to the nurse that the physician should be contacted. He was notified. I then contacted Linda Klingingsmith to see if she could find out who the nurse was and to find out some more details. About 2 hours later, she came by the pharmacy and related to use the details as the IV nurse interpreted the situation. The solution had been piggy-backed into the patient, but that the reason the IV rate was decreasing was due to the fact that the IV was running through a final filter. The amphotericin was gradually clogging up the filter, as either a precipitate or large size of the particle was too big for the filter. The IV nurse then set up a new line. The re-prepared Amphotericin in Dextrose 5% was administered to the patient and by-passing the filter. Mr. Johnson was quite relieved to hear this piece of news. Ms. Conti, Mr. Johnson, and I conversed with Aman and Mr. Burrell at approximately 3:00 PM. She asked then the flow of events of that evening. She expressed to both of them about proper notification of proper pharmacy authorities until approximately 72 hours later, and that Mr. Burwell had been dispatched to see the incorrect IV solution in deference to Aman. She also stated that she would have to confer with Ms. Welch before making any kind or type of recommendation because the evidence had been destroyed.

5-2-85 – I conferred with Ms. Conti after her conversation with Ms. Welch. It was recommended that because of events during the day. Mr. Johnson should be given a

3 day suspension starting on 5-3-85. He is to return to work on Wednesday, May 8, 1985.

/s/ M. Franklin Jefferson
M. Franklin Jefferson
Director of Pharmaceutical Services
May 3, 1985

4/26/85 Combs Rm 281

I received a call sometime between 7-7:30 p stating that the IV was not running. The insertion site looked good when I had seen the IV on rounds made earlier that evening. When I arrived I noted the IVPB of amphotericin was connected with add-a-line tubing directly into the main continue flow tubing of D_5^5NS. There was a green tag covering the piggyback to protect it from the light. The filter was clogged on the main tubing preventing the infusion of the medication. A filter should not be used with amphotericin. I first changed the main line + resumed the infusion of D_5NS. Then I set the amphotericin up on an I-MED tubing, while doing that I noticed that the drug was mixed in a 250 cc bag of NS—I double checked the medication label which did state medication should not run through a filter + that it was mixed in D_5W. Approximately 50-75 cc of the medication had infused. Pharmacy was notified by the floor. Dr Wadler (attending physician) was called + informed of the incident by the floor.

Mary Luce IVT 5/1/85

APPENDIX I

CHAPTER V

INTRAVENOUS ADMIXTURE INCOMPATIBILITIES

Incidence of Incompatibilities

An intravenous admixture is incompatible when the prescribed drugs cannot be combined safely and satisfactorily. The incompatibility may be between two drugs or between a drug and the intravenous solution. The incidence of incompatibilities is relatively low when compared to the number of intravenous admixtures prepared, but the possibility of an unexpected or undesirable combination always exists. If an incompatibility occurs and goes undetected, the patient may not receive the full therapeutic effect of the medication. A more serious consequence is that an incompatibility may lead to the formation of toxic products having an adverse effect on the patient.

Types of Incompatibilities

Incompatibilities may be classified as physical, chemical, or therapeutic.

Physical Incompatibilities: A physical incompatibility occurs when two drugs are combined in a solution to produce a change in the appearance of that solution. This visual change may be recognized as a change in color, evolution of a gas, development of a haze, or formation of a precipitate (solid particles which settle out of solution upon standing). This is the easiest type of incompatibility to detect because it can be visually observed.

An example of a physical incompatibility is the combination of Fungizone© amphotericin B with 0.9% Sodium Chloride Injection which results in precipitation of the drug.

Chemical Incompatibilities: A chemical incompatibility occurs when two drugs react to cause the chemical degradation of one or both drugs. This type of incompatibility may be a nonvisual incompatibility in which its occurrence can be detected only by analytical methods or may be manifest by a physical change in the solution.

An example of a chemical incompatibility is the combination of penicillin G and vitamin B complex *** C. Although there is no visual evidence of the interaction, the penicillin G is inactivated by the low pH caused by the ascorbic acid in the vitamin preparation.

APPENDIX J

James G. WALKER, R.Ph., J.D.

September 16, 1985

What changes would you like to see take place in the Pharmacy? Please comment on the following, and return to Jim Gary by Monday, September 23, 1985. Thank you. (Please use additional sheets if necessary).

1. *Scheduling*
   My schedule is fine. It is based on the contract.
2. *Filling of the cassettes*
   Leave it just like it is.
3. *Putting combination lock on the doors.* 1. Do not put combination locks on the doors. It will impede entering and exiting from the pharmacy. 2. Take the combination lock off of the narcotic vault and put a lock with a key on it. The combination lock is impeding entering into the narcotic vault.
4. *What is the problem with working supervisors?*
   See question 12.
5. *Control of drug inventory, better drug stock*
   An estimate should be made of the amount of each drug needed in the pharmacy. Whenever, there are only ten units of a drug left in the pharmacy that drug must be ordered in an amount to give us the original estimate. An order must be placed on every Thursday, that will give us enough of every drug in the pharmacy to last until Monday.
6. *Sharing of mail boxes*
   Fine as long as each individual's mail is identifiable.
7. *Training and orientation*
   N/A since I came in as an experienced pharmacist.

8. *What is the problem with the dumbwaiter?*
   It is suppose to be used for stat medication, instead routine orders are placed on the dumbwaiter and medication which is placed on the dumbwaiter remains for long periods of time.

9. *How can we control missing medications and have more accountability?*
   The carts must be filled in time to allow more than one pharmacist to check them. No one pharmacist should check all of the carts.

10. *Better system for coding MAR's in Pharmacy*
    All medication sent from the Pharmacy should be charged.

11. *Communications*
    No comment.

12. *What other comments or suggestions do you have?*
    (A) There appears to be a pay disparity among the pharmacists.
    (B) There appears to be night differential pay disparity with other hospital staff.
    Night pharmacist paid "evening differential"; others paid full "night differential".
    (C) To prevent over exposure to agents which may cause cancer, a pharmacist SHOULD NOT prepare more than one CHEMO per 24 hour period (per tour of duty). Disposable CHEMO jackets are needed.
    (D) Does "working supervisor" mean: Person fills prescriptions and does other hands on functions, as well as certifies the correctness of the work of others, and accepts the responsibility for the consequences of actions taken?

APPENDIX K

TITLE: PROMOTIONS

POLICY

Suburban Hospital has an active program of promotion from within. When a job vacancy occurs, consideration is given to current employees. Employees should apply for promotions directly to their department heads.

PROCEDURE

SEE: *TRANSFERS AND PROMOTIONS*

/s/ Sharon M. Tanner 5/27/82
DIRECTOR OF PERSONNEL (DATE)

/s/ Joan Finnerty 5-27-82
HOSPITAL ADMINISTRATOR (DATE)

REVIEW DATES:

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PAGE 1 OF 1

TITLE: TRANSFERS AND PROMOTIONS

POLICY

Suburban Hospital has an active program of career advancement and promotion from within. Consideration is given to all interested employees when a job vacancy occurs. Transfers and promotions will be made on the basis of seniority, qualifications and previous performance records. Requests for transfers into posted posi-

tions may be made at any time during the posting period, and consideration of these requests will be given when a specific posted position exists.

Only non-probationary employees will be considered for transfer. Exceptions for extraordinary cases may be made upon recommendation of the department head.

This policy shall be used for transfers (including promotions) from:

1. One department to another
2. One cost center to another
3. One position to another

PROCEDURE

All non-administrative position vacancies will be listed for a minimum of five working days on a weekly job posting list located on the bulletin board by the employee entrance. Employees are responsible for initiating an application for transfer to any posted vacancy for which they feel they are qualified.

Employees who are best qualified for a position vacancy within their department will be given priority consideration for the position. If no employee is selected for the position, outside applicants will be considered.

All applicants for a position vacancy will be judged according to their ability to meet all of the following criteria:

1. Section (unit), departmental, or hospital seniority (this is in order of priority)
2. Educational requirements for the position
3. Experience requirements for the position
4. Special skills required
5. A satisfactory employee according to the personnel record

An employee seeking a transfer will begin the process by contacting the personnel department for counseling about the position and, if a transfer is recommended, completion of form #FT 990. The employee will be required to schedule the necessary interviews and obtain appropriate signatures. The personnel department will advise the employee of each step to be followed. At the end of the second interview, the interviewer will return the transfer request form to the personnel department.

The personnel department will notify the employee of the interview outcome. If any employee is accepted for transfer or promotion, the personnel department will notify the employee's current supervisor. The transfer will occur at the beginning of the pay period generally following a two-week notice to the employee's current supervisor unless a greater or lesser period has been agreed upon by all parties to the transfer.

/s/ Sharon M. Tanner 5/27/82
DIRECTOR OF PERSONNEL (DATE)

/s/ Joan Finnerty 5-27-82
HOSPITAL ADMINISTRATOR (DATE)

REVIEW DATES:

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APPENDIX L

TITLE: SHIFT DIFFERENTIALS

POLICY

Employees who work the evening and night shifts receive additional compensation in the form of a differential either as a percentage of the base of a pay grade or as a fixed amount.

PROCEDURE

In order to carry out the above policy, the following parameters are to be followed:

NORMAL SHIFTS:

1. Day Shift: Any scheduled shift which *begins and ends* between 6:00 a.m. and 6:00 p.m.
2. Evening Shift: Any scheduled shift which *begins and ends* between 3:00 p.m. and 1:00 a.m.
3. Night Shift: Any scheduled shift which *begins and ends* between 11:00 p.m. and 8:00 a.m.

EXCEPTIONAL SHIFTS:

Any scheduled shift which begins in one normal shift and ends in another will be paid the differential for the shift in which 50% or more of the hours occur.

EXAMPLES:

1. An employee who is scheduled to work 3:00 p.m. to 11:30 p.m. will be paid 8 hours of evening differential.
2. An employee who is scheduled to work 1:00 p.m. to 11:30 p.m. would be paid 10 hours of evening differential.

3. An employee who is scheduled to work 10:00 p.m. to 6:30 a.m. would be paid 8 hours of night differential.
4. An employee who is scheduled to work 11:00 a.m. to 7:30 p.m. would be paid as a day employee with no differential.
5. An employee who is scheduled to work 12 noon to 8:30 p.m. would be paid 8 hours of evening differential.

TITLE: SHIFT DIFFERENTIALS

6. If an employee works a double shift, each shift will be treated separately. An employee who is scheduled to work 7:00 a.m. to 3:30 p.m. and then works an additional shift until 11:30 p.m. would be paid 7½ hours of evening differential.

/s/ Bernadette Welch 5/11/84
DIRECTOR OF PERSONNEL (DATE)

/s/ Joan Finnerty 5/14/84
HOSPITAL ADMINISTRATOR (DATE)

REVIEW DATES:

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SUBURBAN HOSPITAL (LIVE) BIWEEKLY PERSONNEL LIST 8470

Name	Empl. #	Adj. Hire	Ruw Sal.	Dept.	Shf.	Hrs.	Job Code	Grade	Step	Base
Amanullah, A. M. M.	020803703	07/20/80		8470	1	30	0514	181		14.01
Anderson, S. A.	578747746	09/04/84		8470	1	80	0084	080		6.51
Armah, R. G.	578765504	06/27/83		8470	1	80	0505	070		6.61
Bae, In Sook	157589596	07/01/83		8470	1	16	0514	181		12.56
Burwell, Q. A.	577805481	06/06/83		0470	1	80	0515	070		6.57
Carroll, Mary D.	579506792	09/23/63		8470	1	80	0517	010		6.64
Cureton, J. C.	067544337	10/07/85		8470	1	80	0516	050		5.36
Delk, P. L.	258945766	07/15/85		8470	1	32	0514	181		12.92
Donahoe, S.	216645063	03/18/85		8470	1	0	0516	050		5.47
Dorcas, Jon M.	218665474	03/26/85		8470	1	80	0514	181		12.02
Dowd, B. J.	281429455	09/08/85		8470	1	80	0514	181		13.79
Fine, S. L.	29346583	05/30/85		8470	1	32	0514	181		14.28
Gitt, Ellen R.	376566471	12/25/84		8470	1	0	0514	181		13.13
Greaves, A. M.	578829388	09/09/84		8470	1	80	0517	010		5.28
Hailu, Aster	578886537	02/08/83		8470	1	80	0514	181		12.68
Hekimian, B. W.	578461069	01/13/69		6470	1	80	0514	181		14.72
Jefferson, M. F.	226583353	08/15/83		8470	1	80	0510	300		20.20
Johnson, E. E.	024483410	11/28/83		8470	1	80	0512	200		15.97
Jones, M. L.	579409201	06/14/80		8470	1	32	0513	191		13.57
Junge, G. M.	532747840	07/15/85		8470	1	80	0515	070		6.52

Name	Empl. #	Adj. Hire	Ruw Sal.	Dept.	Shf.	Hrs.	Job Code	Grade	Step	Base
Kolb, T. E.	219928163	07/23/84		8470	1	80	0515	070		6.02
Kyaw Hoe, J.	170521600	08/29/82		8470	1	32	0516	050		5.80
Lanier, E. H.	135482578	03/05/84		8470	1	80	0515	070		6.17
Lively, C. M.	578844842	05/09/82		8470	1	80	0515	070		6.15
Marchand, H. C.	229906546	08/13/84		8470	1	80	0518	200		14.71
McGowan, M. B.	587649513	03/20/85		8470	1	80	0514	181		13.58
McLaren, E. A.	212987510	03/28/83		8470	1	80	0515	070		6.29
Onley, D. A.	578600273	12/05/82		8470	1	0	0515	070		6.26
Peterson, W. J. Jr.	254606141	05/15/77		8470	1	24	0514	181		13.71
Shapiro, S. A.	543689372	07/24/85		8470	1	80	0515	070		6.26
Snedeker, C. A.	119546234	09/30/85		8470	1	80	0519	210		10.84
Thomas, S.	579042190	01/15/84		8470	1	80	0515	070		6.48
Walker, J. G.	577869737	04/29/84		8470	1	80	0514	181		12.40
Walsh, M. M.	577949418	06/12/85		8470	1	16	0517	010		4.78
Williams, K. K.	577866654	11/09/81		8470	1	80	0517	010		5.21
Williamson, D. L.	212666345	09/26/83		8470	1	80	0511	220		15.97
Wong, Fung	436136895	02/08/85		8470	1	80	0514	181		13.70
Yin, Joan	116545656	03/07/81		8470	1	32	0515	070		6.57
Yirenkyi, D. A.	578744266	07/21/81		8470	1	80	0515	070		6.57
Yoshinaga, M.	023349979	07/08/80		8470	1	80	0516	050		6.37

40 Employees

APPENDIX N

10-30-85

It was brought to my attention 10/29/85 (Tuesday) that Efed II caps had been written in the want book—they were not obtainable from any local wholesaler. In the afternoon of 10/29 Dr. Kline was called and notified of the problem of obtaining Efed II which is a combination of ephedrine and caffeine. The afternoon pharmacist (Barbara Dowd) notified the physicians that we did have ephedrine available and asked if this would be an acceptable alternative. He stated that he had spoken with a pharmacist the night before (presumably James Walker) who told him we did not have ephedrine available.

At this time I have not spoken to James Walker but it was felt that this should be prepared as a written report.

Heidi Marchand, Pharm.D.

APPENDIX O

Chemo Orders

Require - 1 Physician order in writing
2 Sterile products laboratory order form

Procedures

1) Information will be transferred to the IV profile from the physician's order.

2) The pharmacist in charge of the IV Room will estimate time needed to compound the order.

3) Labels are typed that include all information on the normal IV label plus information relating to final volume, special handling precaution.

4) Vertical Laminar flow hood will be turned & sterilized on and allowed to run for 15 minutes before beginning of compounding.

5) Material will be collected that will be needed for the compounding i.e. medications, solutions, needles, syringes, gauze pads, chemopins.

6) A red containation bag will be placed in the trash can, for disposal of chemo contaminated material.

7) The pharmacist will priority the materials to be made to allow for maximum compounding efficiency.

8) The pharmacist will compounding the chemo using proper technique.

9) Material used that may be contaminated by the chemotheraputic will be disposed of in the red contaminated bag bottles, gauze, medication gloves.

10) The bag will be tied and placed in the contaminated disposal waste basket in the main pharmacy.

11) The pharmacist will wash hands & arms immediately.

12) The medications will be sent to the floor by the most appropriate means.

APPENDIX P

NATIONAL STUDY COMMISSION ON CYTOTOXIC EXPOSURE

RECOMMENDATIONS FOR HANDLING CYTOTOXIC AGENTS

September 1984

Preamble

The increasing use of cytotoxic agents and the growing awareness of potential hazards requires special attention to the procedures utilized in the handling, preparation and administration of these drugs. Equally important is the proper disposal of chemical residues and wastes. These recommendations are intended to provide information for the protection of personnel participating in the clinical process of chemotherapy. The mutagenic and carcinogenic potential of many cytotoxic agents is well established and is a possible hazard to the health of exposed individuals. It is the responsibility of institutional and private health care providers to adopt and use appropriate procedures for protection and safety.

I. Environmental Protection

1. All mixing of cytotoxic agents should be performed in a Class II, biological safety cabinet. Type A cabinets are the minimal requirement. Type A cabinets which are vented (some now classified as Type B3) are preferred.

2. Special techniques and precautions must be utilized because of the vertical (downward) laminar airflow (see Supplement I).

3. The biological safety cabinet must be certified by qualified personnel annually or any time the cabinet is physically moved.

4. The biological safety cabinet should be operated with the blower on, 24 hours per day–seven days per week.

5. Drug preparations must be performed only with the view screen at the recommended access opening. Professionally accepted practices concerning the aseptic preparation of injectable products should be followed.

II. Operator Protection

1. Disposable surgical latex gloves are recommended for all procedures involving cytotoxic drugs. Polyvinyl chloride (PVC) gloves should not be worn while handling cytotoxic agents. Several types of PVC gloves are permeable to a variety of drugs.

2. Gloves should routinely be changed approximately every 30 minutes when working steadily with cytotoxic agents. Gloves should be removed immediately after overt contamination.

3. Double gloving is recommended for cleaning up of spills.

4. Protective barrier garments should be worn for all procedures involving the preparation and disposal of cytotoxic agents. These garments should have a closed front, long sleeves and closed cuff (either elastic or knit).

5. All potentially contaminated garments must not be worn outside the work area.

III. Compounding Procedures and Techniques

1. Hands must be washed thoroughly before gloving and after gloves are removed.

2. Care must be taken to avoid puncturing of gloves and possible self-inoculation.

3. Syringes and I.V. sets with Luer-lock fittings should be used whenever possible.

4. Vials should be vented with a hydrophobic filter to eliminate internal pressure or vacuum.

5. Before opening ampules, care should be taken to insure that no liquid remains in the tip of the ampule. A sterile, disposable alcohol dampened gauze sponge should be wrapped around the neck of the ampule to reduce aerosolization.

6. For sealed vials, final drug measurement should be performed prior to removing the needle from the stopper of the vial and after the pressure has been equalized.

7. A closed collection vessel should be available in the biological safety cabinet or the original vial may be used to hold discarded excess drug solutions.

8. Special procedures should be followed for acute exposure or spills (Supplement II).

9. Cytotoxic agents which are handled within the treatment area should be properly labeled (e.g., "Chemotherapy: Dispose of Properly").

Approved by the National Study Commission on Cytotoxic Exposure March 1984

IV. Precautions for Medication Administration

1. Disposable surgical latex gloves should be worn during all cytotoxic drug administration activities.

2. Syringes and I.V. sets with Luer-lock fittings should be used whenever possible.

3. Special care must be taken in priming I.V. sets. The distal tip cover must be removed before priming. Priming should be performed into a sterile, alcohol-dampened gauze sponge, which then is disposed of appropriately.

V. Disposal Procedures

1. Place contaminated materials in a leakproof, puncture-proof container appropriately marked as hazardous waste.

2. Cytotoxic drug waste should be transported according to the institutional procedures for contaminated material.

3. There is insufficient information to recommend any single preferred method for disposal of cytotoxic drug waste.

3.1 One method for disposal of hazardous waste is by incineration at a temperature considered sufficient by the Environmental Protection Agency (EPA) to destroy organic compounds. Incineration should be done in an EPA permitted hazardous waste incinerator.

3.2 Another method of disposal is by burial at an EPA permitted hazardous waste site.

3.3. A licensed hazardous waste disposal company may be consulted for information concerning available methods of disposal in the local area.

VI.. Personnel Policy Recommendations

1. All personnel working with cytotoxic agents must receive special training.

2. Access to the compounding area must be limited to only necessary authorized personnel.

3. The personnel working with these agents should be observed regularly by supervisory personnel to insure compliance with procedures.

4. Acute exposure episodes must be documented. The employee must be referred for professional medical examination.

VII. Monitoring Procedures

1. Procedures to monitor the equipment and operating techniques of the personnel should be performed on a regular basis and documented. Specific methods of monitoring should be developed to meet the complexities of the function.

2. It is recommended that personnel involved in the preparation of cytotoxic agents on a full time basis be given periodic health examinations in accordance with institutional policy.

Supplement I

Special Techniques and Precautions for Use in the Class II Biological Safety Cabinet

1. All equipment needed to complete the procedure in the Class II Biological Safety Cabinet should be placed into the cabinet before beginning and the view screen should be placed at the recommended operating position. A wait of at least two to three minutes before beginning work to allow the unit time to purge itself of airborne contaminants is recommended.

2. The proper procedures for use in the Biological Safety Cabinet are not the same as those used in the horizontal laminar hood. In many cases they seem contradictory, although in theory they are not. This is because of the nature of the airflow pattern in the Biological Safety Cabinet. Clear air descends through the work zone from the top of the cabinet toward the work surface. As it descends, the air is split, with some leaving through the rear perforation and some leaving through the front perforation. The region where the airflow splits is known as the "smoke split" because smoke introduced into this area appears to split into two directions.

3. It is recommended that the smoke split be determined and marked on each cabinet after it is purchased even if the manufacturer states its location. This can be easily done by using an incense stick to generate smoke and moving it gently from front to rear laterally along the work surface of the cabinet near the center.

4. Routinely used large equipment should be placed in the cabinet in its normal position when the determina-

tion of the smoke split is made. The equipment should then be placed in the same position every time the cabinet is used.

5. Personnel should refrain from applying any face powder, eye make-up, rouge, fingernail polish, hairspray or other cosmetics in the work area. These cosmetics may provide a source of prolonged exposure if contaminated.

6. Eating, drinking, chewing of gum, storage of food or smoking in, around or near the Biological Safety Cabinet should be prohibited. Each of these are sources of ingestion if they are accidentally contaminated by the cytotoxic agent or other hazardous products.

7. Sterile products should be arranged in the cabinet so as to minimize the possibility of contamination. This may mean locating them in the immediate vicinity of the smoke split. If appropriate, due to quantity or configuration, the sterile items should be kept only in the center and nonsterile items on either side.

8. For additional operator protection, it is recommended that the area behind the smoke split be used whenever possible since the airflow direction in that area is away from the operator, lessening the chance of accidental exposure.

9. The least efficient area of the cabinet in terms of product and personnel protection is within three inches of the sides near the front opening. Therefore, you should not work within three inches of the sides of the cabinet.

10. Periodic evaluation of the smoke split should be performed on a routine basis. A constantly changing smoke split location may be indicative of problems with the operation of the cabinet.

11. Entry into and exit from the cabinet should be in a direct manner perpendicular to the face of the cabinet. Rapid movements of the hands in the cabinet and laterally through the protective air barrier should be avoided.

Supplement II

Special Procedures for Acute Exposure or Spills

1.0 Acute exposure

1.1 Overtly contaminated gloves or outer garments should be removed and replaced immediately after an exposure.

1.2 Hands should be washed after removing gloves. Gloves are not a substitute for handwashing.

1.3 In case of skin contact with a cytotoxic drug product, the affected area should be washed thoroughly with soap and water as soon as possible. Refer to professional medical attention as soon as possible.

1.4 For eye exposure, flush affected eye with copious amounts of water. Refer to professional medical attention immediately.

2.0 Spills

2.1 All personnel involved in the clean-up of a spill should wear protective clothing (e.g. gloves, gowns, etc.). All clothes and other material used in the process should be treated or disposed of properly.

2.2 Double gloving should be used in the cleaning up of spills.

NATIONAL STUDY COMMISSION ON
CYTOTOXIC EXPOSURE

Louis P. Jeffrey, Sc.D., Chairman
Director of Pharmacy Services
Rhode Island Hospital

Roger W. Anderson, M.S.
Director of Pharmacy
University of Texas
M.D. Anderson Hospital

Clarence L. Fortner, M.S.
Head, Drug Management and Authorization Section
IDB Cancer Therapy Evaluation Program
Division of Cancer Treatment
National Cancer Institute

Joseph F. Gallelli, Ph.D.
Chief, Pharmacy Department
The Clinical Center
National Institutes of Health

Dennis M. Hoffman, Pharm.D.
Director of Pharmacy Services
University of New York at Stony Brook

Louis A. Leone, M.D.
Director of Medical Oncology
Rhode Island Hospital

Robert M. O'Bryan, M.D.
Division Head, Medical Oncology
Henry Ford Hospital

Jeffrey C. Theiss, Ph.D.
Associate Professor and Convenor of
Environmental Services
University of Texas
School of Public Health

Joseph N. Gallina, Pharm.D., *Secretariat*
Director of Pharmacy Services
University of Maryland Medical System/Hospital

For additional information contact:

Louis P. Jeffrey, Sc.D., Chairman
National Study Commission on Cytotoxic Exposure

Rhode Island Hospital
Department of Pharmacy
Providence, Rhode Island 02902

Supported by a grant from Bristol Laboratories

***ng Cancer Chemotherapy Agents

Aronson, R. H. and Sieber, S. M., "Carcinogenic Potential of Cancer Chemotherapeutic Agents in Man," *The Cancer Bulletin* 29:179 (6) 1977.

American Society of Hospital Pharmacists, "Disposal of Unused Anticancer Drugs," *The Signal* May, 1979.

Ames, B. N., et al., "Methods for Detecting Carcinogens and Mutagens with the Salmonella/Mammalian-Microsome Mutagenicity Test," *Mutation Research* 31:347-364 (December) 1975.

*Anderson, M., et al., "Development and Operation of a Pharmacy-Based Intravenous Cytotoxic Reconstitution Service," *B. Med. J.* 286:32-36 (Jan. 1) 1983.

Anderson, R. W., et al., "Risk of Handling Injectable Antineoplastic Agents," *Am. J. Hosp. Pharm.* 39:1881-7 (Dec.) 1982.

*Avis, K. E. and Levchuk, J. W., "Special Considerations in the Use of Vertical Laminar-Flow Workbenches," *Am. J. Hosp. Pharm.* 41:81-87 (Jan.) 1984.

Ballentine, Ron, "Cancerphobia—or Whatever Happened to Red M&M's" (editorial) *Drug Intell. Clinical Pharmacy* 16:60-61 (Jan.) 1982.

Bergemann, D. A., "Handling Antineoplastic Agents," *Am. J. IV Therapy and Clin. Nutrition* 10:13-17 (Jan.) 1983.

Bledsoe, L., "Antineoplastic Agents–Management of Health Risks for the I.V. Nurse," *NITA* 6:332-333, 1983.

Brier, Kenneth L., et al., "Effect of Laminar Air Flow and Clean-Room Dress on Contamination Rates of Intravenous Admixtures," *Am. J. Hosp. Pharm.* 38: 1144-47 (Aug.) 1981.

Carrano, A. V., et al., "Sister Chromatid Exchange as an Indicator of Mutagenesis," *Nature* 271:551-553 (Feb. 9) 1978.

Clayson, D. B., "Principles Underlying Testing for Carcinogenicity," *Cancer Bulletin* 29:161-166 (6) 1977.

Crudi, C. B., "A Compounding Dilemma: I've Kept the Drug Sterile But Have I Contaminated Myself?" *NITA* 3:77-8, 1980.

D'Arcy, P. F., "Reactions and Interactions in Handling Anticancer Drugs," *Drug Intell. Clinical Pharmacy* 17:532-538 (July/Aug.) 1983.

Davis, M. R., "Guidelines for Safe Handling of Cytotoxic Drugs in Pharmacy Department and Hospital Wards (The Society of Hospital Pharmacists of Australia)," *Hosp. Pharm.* 16:17-20 (Jan.) 1981.

Donner, A. L., "Possible Risk of Working with Antineoplastic Drugs in Horizontal Laminar Flow *oods (letter)," *Am. J. Hosp. Pharm.* 35:900 (Aug.) 1978.

*alck, K., et al., "Mutagenicity in Urine of Nurses Handling Cytostatic Drugs (letter)," *Lancet* 1:1250-1 (June 9) 1979.

Garber, E., "Chemical Carcinogenesis," *New Engl. J. Med.* 305:1379-89 (Dec. 3) 1981.

Gibson, J. F., et al., "Mutagenicity of Urine From Nurses Handling Cytotoxic Drugs" (letter), *Lancet* 100-107 (Jan. 14) 1984.

Gousse, G. C., et al., "Biological Safety Cabinets for Chemotherapy Preparation (letter)," *Am. J. Hosp. Pharm.* 38:967 (July) 1081.

Goss, Jody, et al., "Possible Hazards of Working with Cytotoxic Agents," *Oncology Nursing Forum* *:10-12, 1981.

Hamilton, C. W., "Risk to Personnel Admixing Cancer Chemotherapy," *US Pharm.* 7:H1-H8 (July) 1982.

Harris, C. C., "A Delayed Complication of Cancer Therapy—Cancer," *JNCI* 63:275-7, 1979.

*Harrison, Bruce R., "Developing Guidelines for Working with Antineoplastic Drugs," *Am. J. Hosp. Pharm.* 38:1686-1693 (Nov.) 1981.

**Hennessy, K. and Duval, A. "Chemotherapy Waste Disposal: A Safe and Practical Method," *NITA* 5:311-312, 1982.

**Hirst, M., "Occupational Exposure to Cyclophosphamide," *Lancer* 1:186-188 (Jan. 28) 1984.

*Hoffman, D. M., "The Handling of Antineoplastic Drugs in a Major Cancer Center," *Hosp. Pharm.* 15: 302-304 (June) 1980.

Hoffman, D. M., "Handling Cytotoxic Drugs (letter)," *Am. J. Hosp. Pharm.* 38:1284-86 (Sept.) 1981.

Honda, D., Ignoffo, R. J., and Power, L. A., "Safety Consideration in the Preparation of Parenteral Antineoplastics," *CSHP Voice* 8:94-96 (Winter) 1981.

Hoover, R. and Fraumeni, J. D., "Drug-Induced Cancer," *Cancer* 47:1071-80 (March 1) 1981 (Supplement).

**Johnson, B. L. and Gross, J., "Handling Methotrexate —A Safety Problem," *Am. J. Nursing* 82:1531 (Oct.) 1982.

Kleinberg, M. L. and Quinn, M. J., "Airborne Drug Levels in a Laminar-Flow Hood," *Am. J. Hosp. Pharm.* 38:1301-13 (Sept.) 1981.

*Knowles, R. S. and Virden, J. E., "Handling of Injectable Antineoplastic Agents," *Brit. Med. J.* 281:589-91 (August 30) 1980.

Ladik, C. F., et al., "Precautionary Measures in the Preparation of Antineoplastics (letter)," *Am. J. Hosp. Pharm.* 37:1184-86 (Sept.) 1980.

**LeRoy, M. L., et al., "Procedures for Handling Antineoplastic Injections in Comprehensive Cancer Centers," *Am. J. Hosp. Pharm.* 40:601-603 (April) 1983.

Marquardt, H. and Marquardt, H. "Induction of Malignant Transformation and Mutagenesis in Cell Cultures by Cancer Chemotherapy Agents," *Cancer* 40:1930-34 (Oct.) 1977 (Supplement).

**Mattia, M. A. and Blake S. L., "Hospital Hazards: Cancer Drugs," *Am. J. Nursing* 83:758-762 (May) 1983.

**Neal, A., et al., "Exposure of Hospital Workers to Airborne Antineoplastic Agents," *Am. J. Hosp. Pharm.* 40:597-601 (April) 1983.

**Nevasaari, K., "Handling Cytostatic Drugs" (letter) *Lancet* 1:247-248 (Jan. 29) 1983.

Ng, L. M., "Possible Hazards of Handling Antineoplastic Drugs (letter)," *Pediatrics* 46:648-49, 1970.

Norppa, H., et al., "Increased Sister Chromatid Exchange Frequencies in Lymphocytes of Nurses Handling Cytostatic Drugs," *Scand. J. Work Environ. Health* 6(4):299-301 (Dec.) 1980.

Perlman, M. and Walker, R., "Acute Leukemia Following Cytotoxic Chemotherapy (letter)," *JAMA* 224:250 (April 9) 1973.

Redfearn, J., " 'Safety' Cabinets are not safe, Says UK Study," *Nature* 278:384 (March 29) 1979.

Reich, Steven D., "Antineoplastic Agents as Potential Carcinogens: Are Nurses and Pharmacists at Risk?," *Cancer Nursing* 4:500-502 (Dec.) 1981.

Reimer, R. R., et al., "Acute Leukemia After Alkylating Agent Therapy of Ovarian Cancer," *N. Engl. J. Med.* 297:177-81, 1977.

Rosner, F., "Acute Leukemia as a Delayed Consequence of Cancer Chemotherapy," *Cancer* 37:1033-6, 1976.

Sieber, S. M., "Cancer Chemotherapeutic Agents and Carcinogenesis," *Cancer Chemo. Reports* 59:915-18 (Sept./Oct.) 1975.

**Solimando, D. A. "Preparation of Antineoplastic Drugs: A Review," *Am. J. IV Therapy and Clin Nutrition* 10:16-27 (Sept.) 1983.

**Sotaniemi, E. A., "Liver Damage in Nurses Handling Cytotoxic Agents," *Acta. Med. Scand.* 214:181-189, 1983.

Staiano, N., et al., "Lack of Mutagenic Activity in Urine from Hospital Pharmacists Admixing Antitumour Drugs," *Lancet* 1:615-16, 1981.

Stolar, M. H., et al., "Recommendations for Handling Cytotoxic Drugs in Hospitals," *Am. J. Hosp. Pharm.* 40:1163-1171 (July) 1983.

Stuart, D. G., et al., "Survey, Use, and Performance of Biological Safety Cabinets," *Am. Ind. Hygiene Assoc. J.* 43:264-670 (April) 1982.

Theiss, J. C., "Detection of Carcinogens," in *Cancer-Achievements, Challenges, and Prospects for the 1980's*, Vol. 1, Burchenal, J. H. and Oettgen, H. F., Editors, Grune and Stratton, New York, 1981, pp. 281-90.

Thomsen, K. and Mikkelsen, H. I., "Protective Capacity of Gloves Used for Handling of Nitrogen Mustard," *Contact Dermatitis* 1:268-69 (Aug.) 1975.

*Tortorici, M. p., "Precautions Followed by Personnel Involved with the Preparation of Parenteral Antineoplastic Medications," *Hosp. Pharm.* 15:293-301 (June) 1980.

**Vaccari, P. L., et al., "Disposal of Antineoplastic Wastes at the National Institutes of Health," *Am. J. Hosp. Pharm.* 41:87-93 (Jan.) 1984.

**Venitt, S., et al., "Monitoring Exposure of Nursing and Pharmacy Personnel to Cytotoxic Drugs: Urinary Mutation Assays and Urinary Platinum as Markers of Absorption," *Lancet* 1:74-77 (Jan. 19) 1984.

Waksvik, H., et al., "Chromosome Analyses of Nurses Handling Cytostatic Agents," *Cancer Treat. Rep.* 65: 607-10 (July/Aug.) 1981.

Weisburger, J. H., et al., "The Carcinogenic Properties of Some of the Principal Drugs Used in Clinical Cancer Chemotherapy," *Recent Results Cancer Res.* 52:1-17, 1975.

Wilson, J. P. and Solimando, D.A., "Antineoplastics: A Safety Hazard? (letter)," *Am. J. Hosp. Pharm.* 38: 624 (May) 1981.

Wilson, James P., et al., "Aseptic Technique as a Safety Precaution in the Preparation of Antineoplastic Agents," *Hosp. Pharm.* 16:575-81 (Nov.) 1981.

Zellmer, William A., "Reducing Occupational Exposure to Potential Carcinogens in Hospitals (editorial)," *Am. J. Hosp. Pharm.* 38:1679 (Nov.) 1981.

*Zimmerman, Paul F., et al., "Recommendations for the Safe Handling of Injectable Antineoplastic Drug Products," *Am. J. Hosp. Pharm.* 38:1693-95 (Nov.) 1981.

*References containing handling guidelines.
**Additional references since March 1983.

APPENDIX Q

Suburban Hospital Association
8600 Old Georgetown Road
Bethesda, Maryland 20814

EMPLOYMENT AGREEMENT–NIGHT PHARMACIST

I hereby agree to the following conditions of employment:

1 I will work an alternative work week schedule consisting of seven (7) consecutive ten (10) hour night shifts on duty and the next seven (7) consecutive nights off duty.

2 I will be paid for eighty (80) hours for each seven (7) consecutive ten (10) hour night shifts worked.

3 I will be entitled to all benefits eligible to full-time employees of Suburban Hospital with the following *exceptions,* even if a record of one of these exceptions appears on my pay check, a computerized print-out or the benefit accrual plan:

A – VACATION
B – HOLIDAYS
1 – LEGAL HOLIDAYS
2 – PERSONAL SERVICE DAYS
3 – BIRTHDAYS

4 As an exempt professional employee, I will receive no overtime premium pay.

5 If I decide to leave the employment of Suburban Hospital as a night pharmacist, I will give at least THIRTY (30) days notice prior to my last day of employment.

6 I understand that a copy of this agreement will be placed in my employee file and that I will be given a copy.

7 Suburban Hospital reserves the right to discontinue this type of scheduling. If this type of scheduling is to be discontinued, the hospital will give the employee a minimum of 30 days notice.

Name of Employee (print) – /s/ James George Walker

Signature - /s/ James George Walker Date - May 16, 1984

Employer Representative (print) – /s/ Kevin A. Yarrow

Signature - /s/ Kevin A. Yarrow Date - 05-16-84

Adopted – 4-18-84

APPENDIX R

STATE OF MARYLAND
DEPARTMENT OF HEALTH AND MENTAL HYGIENE
STATE BOARD OF PHARMACY
201 West Preston Street
Baltimore, Maryland 21201
Area Code 301-225-5910
TTY FOR DEAF: Balto 383-7555
D.C. Metro 565-0451

November 16, 1988

Walker Pharmacy, Inc.
7849 Eastern Avenue
Silver Spring, MD 20910

Dear Sir

This is in reply to your letter concerning Barbara Jeanne Dowd. We are furnishing you with the information you requested.

Ms. Dowd applied for a Maryland Pharmacist License on 11/8/85 and she became authorized to practice pharmacy on 11/20/85.

Any questions please feel free to call us at 295-5910.

Sincerely,

Damaris Prince
State Bd of Pharmacy

APPENDIX S

PUBLIC LAW 100-259 [S. 557]; March 22, 1988

CIVIL RIGHTS RESTORATION ACT OF 1987

For Legislative History of Act, see Report for P.L. 100-259 in U.S.C.C. & A.N. Legislative History Section.

An Act to restore the broad scope of coverage and to clarify the application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

Section 1. This Act may be cited as the "Civil Rights Restoration Act of 1987".

FINDINGS OF CONGRESS

Sec. 2. The Congress finds that—

(1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964; and

(2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.

EDUCATION AMENDMENTS AMENDMENT

Sec. 3. (a) Title IX of the Education Amendments of 1972 is amended by adding at the end the following new sections:

"INTERPRETATION OF 'PROGRAM OR ACTIVITY'

"Sec. 908. For the purposes of this title, the term 'program or activity' and 'program' mean all of the operations of—

"(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

"(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

"(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

"(B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

"(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship;

"(1) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

"(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

"(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

"(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 901 to such operation would not be consistent with the religious tenets of such organization."

(b) Notwithstanding any provision of this Act or any amendment adopted thereto:

"NEUTRALITY WITH RESPECT TO ABORTION

"Sec. 909. Nothing in this title shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.".

REHABILITATION ACT AMENDMENT

Sec. 4. Section 504 of the Rehabilitation Act of 1973 is amended—

(1) by inserting "(a)" after "Sec. 504."; and

(2) by adding at the end the following new subsections:

"(b) For the purposes of this section, the term 'program or activity' means all of the operations of—

"(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

"(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

"(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

"(B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

"(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

"(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

"(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

"(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

"(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

"(c) Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on the date of the enactment of this subsection.".

AGE DISCRIMINATION ACT AMENDMENT

Sec. 5. Section 309 of the Age Discrimination Act of 1975 is amended—

(1) by striking out "and" at the end of paragraph (2);

(2) by striking out the period at the end of paragraph (3) and inserting "; and" in lieu thereof; and

(3) by inserting after paragraph (3) the following new paragraph:

"(4) the term 'program or activity' means all of the operations of—

"(A)(i) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

"(ii) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

"(B)(i) a college, university, or other postsecondary institution, or a public system of higher education; or

"(ii) a local educational agency (as defined in section 198(a)(10), of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

"(C)(i) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

"(I) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

"(II) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

"(ii) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

"(D) any other entity which is established by two or more of the entities described in subparagraph (A), (B), or (C);

any part of which is extended Federal financial assistance.".

CIVIL RIGHTS ACT AMENDMENT

Sec. 6. Title VI of the Civil Rights Act of 1964 is amended by adding at the end the following new section:

"Sec. 606. For the purposes of this title, the term 'program or activity' and the term 'program' mean all of the operations of—

"(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

"(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is ex-

tended, in the case of assistance to a State or local government;

"(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

"(B) a local educational agency (as defined in section 198(~~a~~)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

"(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

"(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

"(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

"(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

"(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.".

RULE OF CONSTRUCTION

Sec. 7. Nothing in the amendments made by this Act shall be construed to extend the application of the Acts so amended to ultimate beneficiaries of Federal financial

assistance excluded from coverage before the enactment of this Act.

ABORTION NEUTRALITY

Sec. 8. No provision of this Act or any amendment made by this Act shall be construed to force or require any individual or hospital or any other institution, program, or activity receiving Federal Funds to perform or pay for an abortion.

CLARIFICATION OF INDIVIDUALS WITH HANDICAPS IN THE EMPLOYMENT CONTEXT

Sec. 9. Section 7(8) of the Rehabilitation Act of 1973 is amended by adding after subparagraph (B) the following:

"(C) For the purpose of sections 503 and 504, as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.".

Jim Wright
Speaker of the House of Representatives.

Harry M. Reid
Acting President of the Senate Pro Tempore.

IN THE SENATE OF THE UNITED STATES,

March 22 (legislative day, March 21), 1988.

The Senate having proceeded to reconsider the bill (S. 557) entitled "An Act to restore the broad scope of

coverage and to clarify the application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964", returned by the President of the United States with his objection, to the Senate, in which it originated, it was

Resolved, That the said bill pass, two-thirds of the Senators present having voted in the affirmative.

Attest: Walter J. Stewart

Secretary.

I certify that this Act originated in the Senate.

Walter J. Stewart

Secretary.

IN THE HOUSE OF REPRESENTATIVES, U.S.,

March 22, 1988.

The House of Representatives having proceeded to reconsider the bill (S. 557) entitled "An Act to restore the broad scope of coverage and to clarify the application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964", returned by the President of the United States with his objections, to the Senate, in which it originated, and passed by the Senate on reconsideration of the same, it was

Resolved, That the said bill pass, two-thirds of the House of Representatives agreeing to pass the same.

Attest: Donnald K. Anderson

Clerk.

LEGISLATIVE HISTORY–S. 557:

SENATE REPORTS: No. 100-64 (Comm. on Labor and Human Resources).

CONGRESSIONAL RECORD, Vol. 134 (1988):

Jan. 26-28, considered and passed Senate.

Mar. 2, considered and passed House.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 24 (1988):

Mar. 16, Presidential veto messages.

CONGRESSIONAL RECORD, Vol. 134 (1988):

Mar. 22, Senate and House overrode veto.

PUBLIC LAW 100-260 [S.J.Res. 126]; March 23, 1988

FREEDOM OF INFORMATION DAY–PROCLAMATION

Joint Resolution to designate March 16, 1988, as "Freedom of Information Day".

Whereas a fundamental principle of our Government is that a well-informed citizenry can reach the important decisions that determine the present and future of the Nation;

Whereas the freedoms we cherish as Americans are fostered by free access to information;

Whereas many Americans, because they have never known any other way of life, take for granted the guarantee of free access to information that derives from the First Amendment to the Constitution of the United States;

Whereas the guarantee of free access to information should be emphasized and celebrated annually; and

Whereas March 16 is the anniversary of the birth of James Madison, one of the Founding Fathers, who recognized and supported the need to guarantee individual rights through the Bill of Rights: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That March 16, 1988, is designated as "Freedom of Information Day", and the President is authorized and requested to issue a proclamation calling upon Federal, State, and local government agencies and the people of the United States to observe such day with appropriate programs, ceremonies, and activities.

Approved March 23, 1988.

LEGISLATIVE HISTORY–S.J.Res. 126:

CONGRESSIONAL RECORD:

Vol. 133 (1987): Oct. 30, considered and passed Senate.

Vol. 134 (1988): Mar. 15, considered and passed House.

APPENDIX T

relative salary levels of Pharmacist I employees at that time. With the exception of Jon Dorcas, all subsequent pharmacists who had been hired after Mr. Walker possessed considerably more hospital experience than Mr. Walker or additional degrees in pharmacy which merited a higher salary. This computer run reflects the fact that Mr. Walker had been given two raises in August, 1984 and August, 1985 when all pharmacists received an annual percentage increase.

8. The notes on the computer payroll run were compiled after I reviewed the applications and/or resumes of the various incumbents in the Pharmacist I position. My findings with respect to the white pharmacists hired after Mr. Walker were as follows:

(a) As reflected by the application attached hereto as Attachment 5, Melissa McGowan had over seven years experience as a pharmacist with five years hospital experience when she was hired in March, 1985.

(b) As reflected by the application attached hereto as Attachment 6, Sharon Fine had five years hospital experience as a pharmacist, plus an additional year as a resident at the National Institute of Health Clinical Center while she was obtaining her Doctor of Pharmacy degree, an advanced degree in pharmacy studies beyond the bachelor of science degree possessed by most pharmacists. All of this experience and her advanced degree were obtained prior to her date of hire at Suburban in May, 1985.

(c) As reflected by the application attached hereto as Attachment 7, Patricia Delk had three years

and four months hospital experience prior to her date of hire at Suburban in July, 1985.

(d) As reflected by the resume attached hereto as Attachment 8, Barbara Dowd (then Barbara Clark) had seven years hospital experience prior to beginning employment at Suburban Hospital in September, 1985. Ms. Dowd held a pharmacy license from Ohio but did not begin work at Suburban until she had made application to convert her Ohio license to a Maryland License.

(e) As reflected by the resume attached hereto as Attachment 9, Daniel Driver had five years and ten months experience with 3 1/2 years hospital

pharmacist Plaintiff had in mind when he drafted the interrogatory.

Without prejudice to the foregoing objections to Interrogatory No. 22, Defendant Finnerty states that Berj Hekimian had his salary reduced in October, 1985 to $14.72. Plaintiff should be capable of making his own salary comparisons as he should be cognizant of his own salary at any particular point in time.

Interrogatory No. 24.

This interrogatory seeks information about an unidentified white pharmacist who Plaintiff apparently believes was hired without possessing a Maryland Pharmacy License. (*See* Interrogatory No. 23 in Exhibit "A") In responding to Plaintiff's Interrogatories, Defendant Finnerty denied that any pharmacist was hired without a Maryland license. (*See* Response to Interrogatory No. 23 in Exhibit "A"). Plaintiff nevertheless persists in seeking information about this nonexistent pharmacist. Defendant Finnerty cannot be expected to supplement her response to an interrogatory simply because Plaintiff does not like the answer he received.

Interrogatory No. 25

Plaintiff cannot "strike" a portion of Defendant Finnerty's answer to this interrogatory.

Interrogatory No. 21

Why was the salary of the said pharmacist reduced?

Response to Interrogatory No. 21

Defendant Finnerty objects to this interrogatory on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. Without prejudice to the foregoing objection, Defendant Finnerty re-

sponds as follows: The salary was reduced for one white pharmacist because the pharmacist did not work in all areas of the pharmacy department.

Interrogatory No. 22

Was the reduced salary of the said pharmacist still higher than the salary of Plaintiff James G. Walker? (Base pay).

Response to Interrogatory No. 22

Defendant Finnerty objects to this request on the grounds that it is vague and ambiguous. Without prejudice to the foregoing objections, Defendant Finnerty responds to this interrogatory by stating that she is not able to compare salaries without more specific information.

Interrogatory No. 23

From April 1, 1984 to May 31, 1986, was, at any time, a white person hired as pharmacist without possessing a Maryland Pharmacy License? (hired at Suburban and worked without the Maryland license)

Response to Interrogatory No. 23

No.

Interrogatory No. 24

Was the salary of the said person without the Maryland Pharmacy License higher than the salary of Plaintiff James G. Walker? (base pay)

Response to Interrogatory No. 24

Defendant Finnerty incorporates herein by reference her response to Interrogatory No. 23.

Interrogatory No. 25

Were other white pharmacists hired subsequent to Plaintiff James G. Walker with base salaries higher than the base salary of the Plaintiff? (each base salary of each white pharmacist)

Response to Interrogatory No. 25

Defendant Finnerty objects to this interrogatory on the grounds that it is vague and ambiguous. Without prejudice to the foregoing objections, Defendant Finnerty responds to this interrogatory as follows: White pharmacists with greater experience levels than Plaintiff James G. Walker were hired subsequent to the hiring of James G. Walker with base salaries higher than that of Plaintiff.

Interrogatory No. 26

Did another white pharmacist submit a letter to Defendant Dalton Williamson refusing to work in the P.O. Section?

Response to Interrogatory No. 26

Defendant Finnerty objects to this interrogatory on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. Without prejudice to the foregoing interrogatory, Defendant Finnerty responds as follows: No.

Interrogatory No. 27

Was the salary of the said white pharmacist reduced?

Response to Interrogatory No. 27

Defendant Finnerty incorporates herein by reference her response to Interrogatory No. 26.

Interrogatory No. 28

Was the salary of the said white pharmacist greater than the salary of the Plaintiff James G. Walker? (base pay)

APPENDIX V

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
AT BALTIMORE

C.A. No. JH-86-962

James G. Walker,

Plaintiff

v.

Suburban Hospital Association, et al.

Defendants

DOCUMENT TO BE FILED WITH PLAINTIFF'S
RESPONSE MAILED OCTOBER 19, 1988
COUNSELING MEMO ROBERT JACKSON, JR.

The above Document is hereby presented.

Respectfully submitted

James G. Walker, R.Ph., J.D.
1412 Whittier Place, N.W.
Washington, D.C. 20012

Mailed October 22, 1988, postage prepaid to:

Office of the Clerk
101 W. Lombard Street Room 409
UNITED STATES DISTRICT COURT
Baltimore, Maryland 21201

James G. Walker

SUBURBAN HOSPITAL ASSOCIATION
COUNSELING MEMO

Name: Robert Jackson, Jr. Position: Pharmacist I
Department: Pharmacy Supervisor: M.F. Jefferson, Dir. Phcy.

This is a:

1. WRITTEN WARNING	(X)	Effective Date: Nov. 16, 1984
2. PROBATION	( )	
3. SUSPENSION	( )	
4. INVOLUNTARY TERMINATION	(X)	

SUBJECT: (See Policy on Termination Categories for specific offenses)

PERIOD OF POOR SERVICE REFERENCED BELOW IS: FROM 7/16/84 to: 11/16/84

SPECIFY SUPPORTING DETAILS: Employee's probation period ended 10-16-84; given 30-day extension at that time, with problems pointed out at that time; employee is a competent pharmacist; has been warned concerned not answering telephone; still prefers to have someone else answer the phone, preferably technicians; too slow for a staff pharmacist; doesn't seem to be able to prioritize work; still taking too much time on smoke breaks; not very much of a team player; has trouble with being independent at times; may work out better in a slower operation; when doing IV's, has problem doing more than one thing at a time; expects technicians to do their work and part of his; even complained because he did not have the best technicians working with him.

REPETITION OF THIS OR A SIMILAR OFFENSE MAY CONSTITUTE GROUNDS FOR TERMINATION.

Employee Signature: Date:
Supervisor's Signature /s/ Mr. Franklin Jefferson 11-15-84
Witness: /s/ Dalton S. Williamson
EMPLOYEE DID NOT SIGN /s/ Franklin Jefferson

APPENDIX W

[Filed Dec. 28, 1988]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. JH-86-962

JAMES GEORGE WALKER

v.

SUBURBAN HOSPITAL ASSOCIATION, et al.

JUDGMENT ORDER

Upon *de novo* consideration of the record, the Report and Recommendation of United States Magistrate Deborah K. Chasanow dated December 13, 1988, plaintiff's objections filed thereto dated December 21, 1988, and defendants' "Petition for Modification" filed December 21, 1988, it is this 27th day of December, 1988, by the United States District Court for the District of Maryland, ORDERED:

1. That the Magistrate's Report and Recommendation BE, and the same hereby IS, AFFIRMED and ADOPTED;

2. That defendants' motion for summary judgment on §1981 and contract claims BE, and the same hereby IS, GRANTED;

3. That defendant Lloyd Green be allowed to join defendants' motion for summary judgment;

4. That plaintiff's tort claim be DISMISSED without prejudice;

5. That the Clerk close this case; and

6. That the Clerk mail copies of this Order to the plaintiff, counsel of record, and Magistrate Chasanow.

/s/ Joseph C. Howard
Joseph C. Howard
United States District Judge

APPENDIX X

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
DISTRICT OF MARYLAND, to wit:

I, JOSEPH A. HAAS, Clerk of the United States District Court for the District of Maryland, do hereby certify that the documents submitted under this certificate,

VOLUME I – Case Papers
Volume 2 – Case papers
Volume 3 – Case papers
Volume 4 – Case papers/exhibits filed separately

are the true record and proceedings on file in my office, constitute the Record on Appeal in the therein entitled case of WALKER V. SUBURBAN HOSPITAL ASSOC.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the Seal of said District Court this 25th day of January, 1989

[SEAL]

JOSEPH A. HAAS
Clerk of said District Court

BY /s/ Lisa E. Zyltata
Deputy Clerk of said District Court

JH-86-962

PLAINTIFFS

James George WALKER

DEFENDANTS

SUBURBAN HOSPITAL ASSOCIATION, et al.
Joan FINERTY
Paul QUINN
James GARY
Bernadette WELCH
Charles STEWART
Lloyd GREEN
Dalton WILLIAMSON
Eric E. JOHNSON
Heidi Christl MARCHAND
Aester HAILU

CAUSE

(Cite the U.S. Civil Statute under which the case is filed and write a brief statement of the case)

42, U.S.C., SECTION 1983 – JOBS

ATTORNEYS

(For Plaintiffs)

Pro Se
7849 Eastern Avenue
Silver Spring, MD 20910

1412 Whittier Place, N.W.
Washington, D.C. 20012
(202) 723-0593

(For Defendants)

Paul M. Lusky
John G. Kruchko

Kathleen A. Talty
Law Offices of John G. Kruchko
606 Toson Towers
28 W. Allegheny Ave.
Baltimore, MD 21204
321-7310

Date	NR	Proceedings
Sept. 28	74	Order (Howard, J.) dated September 26, 1988 "ADOPTING AND AFFIRMING" the Report and Recommendation (of Chasanow, U.S. Mag.); "DENYING" Request of Defendant re: attorney's fee incurred against Plaintiff's Motion for Protective Order; "GRANTING" Request of Defendant re: attorney's fees and expenses incurred regarding Plaintiff's aborted deposition of 8-17-88; "DIRECTING" Plaintiff to pay the sum of $3,240.00 in expenses and attorney's fees to the Defense attorneys within 45 days as therein set forth. (c/m 9-29-88 mrw) (E.O.D. 10-03-88 mrw)
Oct 05	75	Notice of Plaintiff of paying Three Thousand Two Hundred Forty Dollars ($3,240.00) to Defendants' Attorneys John G. Kruchko and Paul M. Lusky as Ordered by Court September 26, 1988. (c/s)
Oct 14	76	Report and Recommendation of Chasanow, D. (U.S. Mag.) dated October 13, 1988 (c/m by Chambers 10-13-88 mm) (EOD 10-17-88) mrw)
Oct 14	77	Order (Chasanow, D. U.S. Mag.) dated October 13, 1988 "DENYING" request

Date	NR	Proceedings
		of Defendant that Plaintiff appear for Deposition is denyed as Moot; "DENYING" Motion of Defendant for Sanctions Re: Attorneys fees and "GRANTING" as to Out-of-Pocket expenses and "DIRECTING" Plaintiff to pay $35.00 to Defense attorney within 45 days as therein set forth. (c/m by Chambers 10-13-88 mm) (EOD 10-17-88 mrw)
Oct 14	78	Motion of Defendants Exclusing GREEN, for Summary Judgment, Memorandum and Exhibit A, B and Attachment 1 & 2, C and Appendix to Memorandum of Law. (Exhibits and Attachments with Appendix filed separately) (c/s to Chambers. U.S. Mag. c/hand delivered.)
Oct 19	79	Notice of Plaintiff of Paying Thirty Five Dollars to Attorney John Krunchko and Paul Lusky as Ordered by U.S. Magistrate Chasanow October 13, 1988, (c/s) Both
Oct. 20	80	Response of Plaintiff to Motion of Defendant for Summary Judgment. (c/s to Chambers and U.S. Mag.)
Oct. 24	81	Notice of Plaintiff of paying Three Hundred Eighty Dollars and Fifty three cents. ($380.53) for the Deposition and Preliminary Corrections for the Deposition, and Attachments. (c/s to Chambers and U.S. Mag.)
Oct. 24	82	Response document of Plaintiff mailed October 19, 1988 and Counseling Memo. (c/s to Chambers & U.S. Mag.)

Date	NR	Proceedings
Oct. 25	83	Reply Memorandum of Defendant to Opposition of Plaintiffs to its Motion for Summary Judgment and Exhibit A. (c/s to Chambers and U.S. Mag.)
Nov 04	84	Order (Howard, J. dated November 2, 1988 "ADOPTING" Report and Recommendation of Magistrate Chasanow dated October 13, 1988; and "DENYING" Motion of Defendant to dismiss as therein set forth. (c/m 11-04-88 mrw) (EOD 11-07-88 mrw)
Nov 10	85	Corrections of Reporting of Plaintiff errors of Deposition of September 20, 1988 (c/s)
1986		
March 24	1	Complaint.
Apr 8	2	Order (Howard, J.) dated April 7, 1986 "DIRECTING" Clerk to withhold issuance of process until the plaintiff files an amended complaint, as therein set forth; "DIRECTING" Plaintiff to file amended complaint as therein set forth. (c/m 4/11/86 slh) (EOD 4/11/86 slh)
Apr 16	3	AMENDED COMPLAINT
Apr. 24	4	Summons issued. (STEWART & SUBURBAN HOSP. each served 5/16/86; JOHNSON SERVED 5/10/86; MARCHAND served 5/10/86; WILLIAMSON-5/8/86; FINERTY & GARY - 5/7/86; GREEN - 5/5/86; HAILU - UNEXECUTED; WELCH & QUINN - 5/5/86)

Date	NR	Proceedings
May 16	5	Appearance of John G. Kruchko and Kathleen A. Talty as counsel for Defendants.
May 27	6	Motion of Defendants to Dismiss and Memorandum. (c/s)
May 27	7	Notices (11) of Acknowledgment of Receipt of Summons and Complaint and U.S. Marshal Returns Attached.
June 2	8	Response (Points & Authority) to Motion of Defendants to Dismiss (lc/s)
June 2	9	Request of Plaintiff for reissuance of summons and complaint as to Defendant AESTER HAILU
June 12	10	SECOND Summons issued as to Defendant AESTER HAILU.) (Served 6/27/86) (see #16)
June 12	11	Reply of Defendants to Plaintiffs Points and Authority to Deny Defendants Motion to Dismiss. (c/s)
June 19	12	Motion of Plaintiff for Default Judgment against Defendants DALTON WILLIAMSON and ERIC JOHNSON and Points and Authorities.
June 23	13	Motion of Defendants for a Protective Order and Memorandum.
June 27	14	Motion of Plaintiff to Submit Supplemental Points and Authorities (1c/s)
July 2	15	Reply of Defendants to Motion of Plaintiff for Default Judgment (c/s)

Date	NR	Proceedings
July 2	16	Notice and Acknowledgment of Receipt of Summons and Complaint as to Defendant AESTER HAILU and Attachment.
July 8	17	Points and Authorities of Plaintiff in Response to Reply of Defendant to Motion of Plaintiff for Default Judgment. (c/s)
July 10	18	Motion of Plaintiff for Order Compelling Answers to Interrogatories, and Production of Documents by Defendants FINNERTY and MARCHAND and Attachments.
**		
July 3	19	Points and Authorities of Plaintiff in response to Motion of Defendants for Protection Order. (c/s)
Nov. 13	20	Order (Howard, J.) Dated: 12/13/86 Referring case to DANIEL E. KLEIN, U.S., MAGISTRATE, for consideration of all pending motions, holding a hearing, if warranted, and proposing findings of fact and conclusions of law in the form of a report and recommendation regarding the resolution of same. (c/m 12/3/86-aj) (E.O.D. 12/4/86-TL)
1987		
Feb 27	21	Memorandum and Order (Klein, U.S. Magistrate) "DIRECTING" defendants to file a Motion for Summary Judgment within twenty (20) days of the date of this order; "DIRECTING" plaintiff to set forth with particularity the facts supporting his 42 U.S.C. Section 1983 claim within 20 days

Date	NR	Proceedings
		of the date of this order; "DIRECTING" plaintiff to set forth with particularity the facts supporting his 42 U.S.C. Section 1985(3) claim; "DIRECTING" defendants to file a motion for summary judgment under the fifth and fourteenth amendments, "DIRECTING" plaintiff to set forth with particularity the fact supporting his Fifth and Fourteenth Amendment claims and his 42 U.S.C. Section 1981 claim, "DIRECTING" plaintiff to set forth with particularity the facts supporting his claims for harmful exposure and breach of contract and the jurisdictional bases, "DENYING" Motion of plaintiff to compel and "GRANTING" Motion of defendant for Protective Order. (c/m 2-27-87 jnf) (EOD 3-7-87 law)
Mar 19	22	Response of plaintiff to Memorandum and Order dated February 27, 1987. (c/s)
Mar 19	23	Motion of defendants for partial summary judgment; memorandum and affidavit. (c/s)
Apr 01	24	Marginal Order (Chasanow, U.S. Magistrate) "DENYING" Motion of plaintiff for default judgment against DALTON WILLIAMSON and ERIC JOHNSON. (c/m & EOD 4-3-87 law) (See paper #12)
Apr 29	25	Report and Recommendation of U.S. Magistrate Deborah K. Chasanow. (c/m by Chambers) (EOD 4-30-87 law)

Date	NR	Proceedings
May 15	26	Objections of plaintiff to Magistrate's Report and Recommendation. (c/s)
May 26	27	Motion of plaintiff leave to submit additional jurisdiction under Civil Rights Act of 1866. (c/s)
May 26	28	Memorandum (Howard, J.). (c/m. & EOD 5/29/87 vab)
May 26	29	Order (Howard, J.) dated May 22, 1987 *DISMISSING* plaintiff's claim based on 42 U.S.C. Section 1981 and 1985(3), plaintiff's contract and tort claims; *GRANTING* partial summary judgment for the defendants as to plaintiff's claims based on 42 U.S.C. Section 1983 and the fifth and fourteenth amendments; and *DISMISSING* plaintiff's 42 U.S.C. Section 1982 and Title VII claims. (c/m, EOD & Microfilmed 5/29/87 vab) closed Law
June 02	30	Petition of plaintiff for a rehearing on the order of Judge Howard dated May 22, 1987 pursuant to Federal Rule of Civil Procedure 76(b), (c/s)
June 22	31	Marginal Order (Howard, J.) dated June 19, 1987 "DENYING" petition of plaintiff for a rehearing on the order of Judge Howard dated May 22, 1987. (c/m 6-23-87 vab) (EOD 6-25-87 law)
July 6	32	Notice of Appeal of Plaintiff. (Filing Fee Paid) (C/M 7-16-87 mrw) (T.P.O.F. & D/S mailed 7-14-87.)

Date	NR	Proceedings
July 16	—	Record on Appeal transmitted to the U.S. Court of Appeals for the Fourth Circuit, Richmond, VA. (Volume 1)
July 22	33	Docketing Statement and TPOF noting that no transcripts are required.
1988		
Apr. 18	34	Attested copy of the Order of the U.S. Court of Appeals for the Fourth Circuit "AFFIRMING" in part, "REVERSING" in part and "REMANDING" case to the District Court as therein set forth.
Apr. 18	—	Complete record returned to U.S. District Court.
May 3	35	SCHEDULING ORDER (Howard, J.) dated 5-3-88. (c/m Chambers) (EOD 5-4-88 bbe)
May 12	36	ANSWER OF *SUBURBAN HOSPITAL ASSOCIATION ("SUBURBAN"), JOAN FINNERTY, PAUL QUINN, JAMES GARY, BERNADETTE WELCH, CHARLES STEWART, LLOYD GREENE, DALTON WILLIAMSON, ERIC E. JOHNSON, HEIDI CHRISTL MARCHAND* and *AESTER HAILU* to AMENDED COMPLAINT. (c/s)
May 25	37	Response of Plaintiff to Defendants "ANSWER to Amended Complaint: (c/s)
May 25	38	Motion of Plaintiff to Strike each Defense and all Defenses of each Defendant and all Defendants in "Answer to Amended Complaint. (1c/s)

Date	NR	Proceedings
June 1	39	Motion of Defendants' for Adjustment to Scheduling Order & Exhibit A. (c/s)
June 6	40	Motion of Plaintiff to insert word in paragraph 35 of his Response dated May 23, 1988. (c/s)
June 9	41	Letter Order (Howard, J.) dated 6/7/88, advising Plaintiff to inform the court as to whether he desires trial by jury. (c/m by chambers) (EOD 6/9/88 gez)
June 10	42	Request of Plainiff that a Subpoena go to the Maryland State Board of Pharmacy for Determining the Date of Authorization for Barbara Jeanne Dowd (Nee Clark) to Practice Pharmacy in the State of Maryland. (c/s)
June 10	43	Objection of Plaintiff to Defendants' Motion for Adjustment to Scheduling Order Jury Trial (c/s)
June 10	44	Motion of Plaintiff to Compel Defendant HEIDI MARCHAND to Answer Interrogatory and for Sanctions Against Defendant MARCHAND for Not Answerin the Interrogatory. (c/s)
June 10	45	Motion of Plaintiff to Compel Defendant JOAN FINNERTY to Answer Interrogatories and to Produce Documents and for Sanctions Against Defendant FINNERTY for not Answering and not Producing the said Requests. (c/s)
July 1	46	Motion of Plaintiff to present zeroxed copies of documents pursuant to federal rule of civil procedure 1004(1)(2)(3). (c/s)

Date	NR	Proceedings
July 1	47	Response of Plaintiff to Defendant's opposition to motion to compel and attachments (c/s)
July 11	48	Motion of Plaintiff to cite the very recent United States Supreme Court Court Decision No. 86-6139 Decided June 29, 1988. (c/s chambers and Chasanow)
July 20	49	Motion of Plaintiff for Protective Order and reasons for Denying Defendant's taking a deposition and Request for Production of Documents. (c/s)
Aug 02	50	Order (Howard, J.) dated July 29, 1988 "REFERRING" case to U.S. Magistrate Chasanow, to hear as appropriate and determine all discovery disputes in this case; and to conduct proceedings as appropriate and submit recommendations for the disposition of all motions to dismiss or motions for summary judgment that have been filed prior to or following this Order of Reference. (c/m 8-5-88 bbe) (E.O.D. 8-8-88 mrw)
Aug 03	51	Opposition of Defendants to Motion of Plaintiffs for Protective Order and Motion to Compel Plaintiff to appear and produce documents at his deposition and Exhibits A & B. (c/s)
Aug 10	52	Reply of Plaintiff to Opposition of Defendants to its Motion for Protective Order (c/s Chambers & Mag.)

Date	NR	Proceedings
Aug 10	53	Memorandum and Order (Chasanow, U.S. Mag) 1) "DENYING" Motion of Plaintiff to Strike Answers to Amended Complaint; 2) "DEFERRING" Ruling on jury trial issue; 3) "GRANTING" Motion of Plaintiff to insert word contributory; 4) "DENYING" Motion of Plaintiff to compel Heidi Marchan to answer interrogatory and for sanctions; 5) "DENYING" Motion of Plaintiff to compel defendant Joan Finnerty to answer interrogatories as therein set forth; 6) "DENYING" pleading #46 of Plaintiff as improper and unnecessary; 7) "DENYING" Pleading #48 of plaintiff as improper and unnecessary; 8) "DENYING" Motion of Plaintiff for protective order (#49) and opposition of Defendant (51) (C/M By Mag. Chambers) (EOD 8/12/88 feh)
Aug 15	54	Appeal of Plaintiff from Decision of U.S. Magistrate Chasanow dated April 10, 1988 (c/s to Chambers and U.S. MAG.)
Aug 16	55	ORDER (Howard, J.) dated August 15, 1988 "DENYING" Motion of Plaintiff for Protective Order. (c/m 8-17-88 vab) (E.O.D. 8-18-88 mrw)
Aug 19	56	Opposition of Defendants to Appeal of Plaintiff from Decision of U.S. Mag.; Request of Defendants for Plaintiff to clarify his obligations in conformance with U.S. Mag.'s Order; Request for an award of expenses; and Exhibits A & B. (c/s)

Date	NR	Proceedings
Aug 24	57	Motion of Defendant for Adjustment to Scheduling Order (c/s to Chambers & U.S. Mag.)
Aug 24	58	Status Report of Plaintiff. (c/s to Chambers and U.S. Mag.)
Aug 24	59	Response of Plaintiff to Defendants' Response to Plaintiff's Request for Production of Documents. (c/s to Chambers and U.S. Mag.)
Aug 24	60	Response of Plaintiff to Defendants' Opposition to Plaintiff's Appeal from Decision of U.S. Magistrate Chasanow; Request of Plaintiff for an Order to Clarify his Obligations in Conformance with U.S. Magistrate's Order; Request of Plaintiff for Award of Expenses. (c/s to Chambers and U.S. Mag.)
Aug 29	61	Objections of Plaintiff to Motion of Defendant's for Adjustment to Scheduling Order. (c/s to Chambers and U.S. Mag.) and Attachments.
Sept 1	62	ORDER (Howard, J) (dated 8/31/88) ADOPTING AND AFFIRMING Order of Magistrate Chasanow, in full; Directing Plaintiff to attend the deposition, as therein set forth, within ten days of the date of this Order; REFERRING Request of Defendants for attorneys fees to Magistrate Chasanow (c/m 9/2/88 mw) (E.O.D. 9/6/88 jf)

Date	NR	Proceedings
Sept 6	63	Report and Recommendation of U.S. Magistrate Deborah K. Chasanow. (c/m Chambers 9-6-88)
Sept. 8	64	Motion and Order (Chasanow, U.S. Magistrate), dated 9-8-88, directing that the discovery cutoff date shall be changed from 9-10-88 to 9-15-88. (c/m 9-8-88 chambers) (EOD 9-9-88 hsg)
Sept. 14	65	Objection (Notice) of Plaintiff to the Order of Howard, J. dated 8-31-88 and U.S. Mag. Chasanow dated 9-8-88 re: Changes in Deposition dates (c/s)
Sept 15	66	Motion of Defendants to Dismiss or, In the Alternative, Motion for Revised Scheduling Order and Sanctions and Exhibits A thru J. (c/s)
Sept 16	67	Objection of Defendants to Report and Recommendation of U.S. Magistrate Chasanow dated September 6, 1988 and Exhibit A. (c/s to Chambers and U.S. Mag.)
Sept 19	68	Objections of Plaintiff to Report and Recommendation of U.S. Magistrate. (c/s to Chambers & U.S. Magistrate)
Sept 19	69	Supplemental Status Report of Plaintiff. (c/s to Chambers & U.S. Magistrate)
Sept 20	70	Response of Plaintiff to motion of defendants to dismiss. (c/s to Chambers & U.S. Magistrate)
Sept 21	71	SCHEDULING ORDER (Howard, J.) dated September 20, 1988 (C/M by Chambers) (E.O.D. 9-30-88 MRW)

Date	NR	Proceedings
Sept 26	72	Additions to Supplemental Status Report of Plaintiff. (c/s Chambers & Mag.)
Sept 28	73	Order (Letter) (Howard, J.) dated September 23, 1988 "REVISING" Order of 9-20-88 re: Deadline for filing Motions to be set as October 14, 1988. (c/m 9-29-88 mrw) (E.O.D. 10-03-88 mrw)
Sept 28	74	Order (Howard, J.) dated September 26, 1988 "ADOPTING AND AFFIRMING" the Report and Recommendation (of Chasanow, U.S. Mag.); "DENYING" Request of Defendant re: attorney's fee incurred against Plaintiff's Motion to Compel; "GRANTING" Request of Defendant re: attorney's fee incurred against Plaintiff's Motion for Protective Order; "GRANTING" Request of Defendant re: attorney's fees and expenses incurred regarding Plaintiff's aborted deposition of 8-17-88; "DIRECTING" Plaintiff to pay the sum of $3,240.00 in expenses and attorney's fees to the Defense attorneys within 45 days as therein set forth. (c/m 9-29-88 mrw) (E.O.D. 10-03-88 mrw)
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Date	NR	Proceedings
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Oct 14	78	Motion of Defendants Excluding GREEN, for Summary Judgment, Memorandum and Exhibit A, B and Attachment 1 & 2, C and Appendix to Memorandum of Law. (Exhibits and Attachments with Appendix filed separately) (c/s to Chambers. U.S. Mag. c/hand delivered.)
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Oct 20	80	Response of Plaintiff to Motion of Defendant for Summary Judgment. (c/s to Chambers and U.S. Mag.)
Oct. 24	81	Notice of Plaintiff of paying Three Hundred Eighty Dollars and Fifty three cents. ($380.53) for the Deposition and Preliminary Corrections for the Deposi-

Date	NR	Proceedings
		tion, and Attachments. (c/s to Chambers and U.S. Mag.)
Oct 24	82	Response document of Plaintiff mailed October 19, 1988 and Counseling Memo. (c/s to Chambers & U.S. Mag.)
Oct 25	83	Reply Memorandum of Defendant to Opposition of Plaintiffs to its Motion for Summary Judgment and Exhibit A. (c/s to Chambers and U.S. Mag.)
Nov. 04	84	Order (Howard, J. dated November 2, 1988 "ADOPTING" Report and Recommendation of Magistrate Chasanow dated October 13, 1988; and "DENYING" Motion of Defendant to dismiss as therein set forth. (c/m 11-04-88 mrw) (EOD 11-07-88 mrw)
Nov. 10	85	Corrections of Reporting of Plaintiff errors of Deposition of September 20, 1988 (c/s)
Nov 16	86	Proposed Pretrial Order of Plaintiff. (c/s)
Nov 16	87	Jury Instructions of Plaintiff. (c/s)
Nov. 16	88	Witness List of Plaintiff. (c/s)
Nov. 16	89	Question to the Jury submitted by Plaintiff (c/s)
Nov. 18	90	Submission of Additional Documents for Evidence submitted by Plaintiff. (National Study Commission on Cytotoxic Exposure, Intravenous Admixture Incompatibilities.) (c/s)

Date	NR	Proceedings
Nov 23	91	Motion of Defendants In Limine and Memorandum and Exhibits A thru D. (c/s)
Nov. 23	92	Expert Witness List of Plaintiff Specifically Indicated and attachments. (c/s)
Nov 29	93	Objections of Plaintiff to Motion of Defendant In Limine and Attachment. (c/s)
Nov. 29	94	Order (Letter) (Howard, J.) dated November 29, 1988 "RESCHEDULING" Pretrial Conference from November 29, 1988 to January 3, 1989 at 4:30 P.M. and the Trial from December 12, 1988 to January 9, 1989 as therein set forth. (c/m by Chambers) (EOD 11-29-88 mrw)
Dec 14	95	Report and Recommendation ofChasanow, U.S. Magistrate Dated December 13, 1988. (c/m 12-13-88 mm) (EOD 12-15-88 mrw)
Dec 21	96	Objections of Plaintiff to Report and Recommendation of U.S. Mag. Chasanow dated December 13, 1988 and attachments. (c/s)
Dec 21	97	Petition of Defendant for Modification of Magistrate's Report and Recommendation and Exhibit A.
Dec 21	98	Letter (Order) (Howard, J.) dated 12-19-88 requesting counsel file responses and or objections to Report and Recommendation of Magistrate and rescheduling pretrial conference and trial. (c/m Chambers) (EOD) 12-28-88 bbe)

Date	NR	Proceedings
Dec 28	99	JUDGMENT ORDER (Howard, J.) dated December 27, 1988 "AFFIRMING" and "ADOPTING" Report and Recommendation of U.S. Magistrate; "GRANTING" Motion of Defendant for summary judgment on Section 1981; "ALLOWING" Defendant LLOYD GREEN to join Motion of Defendants for Summary Judgment; "DISMISSING" Tort Claim of Plaintiff without prejudice; That Clerk is to close this case as therein set forth. (c/m 12-29-88 mrw) (EOD 1-06-89 mrw)
		[MICROFILMED DATE 7 JAN 1989]
1989		
Jan 5	100	Notice of appeal filed (E.O.D. 1/9/89) dkst/tpof sent 1/9/89 fee paid.
Jan 17	101	Docketing statement & transcript order form received.
Jan 25	–	Complete record on appeal & NOA transmitted to the U.S. Court of Appeals, 4th Circuit Volumes 1 thru 4

APPENDIX Y

UNITED STATES COURT OF APPEALS
FOR THE 4th CIRCUIT
AT RICHMOND, VIRGINIA

No. 89-1412

Walker v. Suburban Hospital et al

APPELLANT'S RESPONSE TO APPELLEES' STATEMENT OF JULY 28, 1989

1. In *Patterson v. McLean,* The Supreme Court did not over rule *Runyon v. McCrary.*

2. *Patterson v. McLean* reinforces the right of a *jury trial* IN Section 1981 Cases - especially when punitive and compensatory damages are being sought.

3. In *Patterson v. McLean,* "the District Court erred when it instructed the jury that the petitioner had to prove that she was better qualified than the white employee" . . . . . .

4. In *Patterson v. McLean* "the judgment of the Court of Appeals was vacated as it related to petitioner's discrimination promotion claim and the Case was remanded for further proceedings." (Jury Trial).

5. In the instant Case, Suburban Hospital is in violation of Public Law 100-259 "Civil Rights Restoration Act" – receiving Federal Funds but practicing racial discrimination in employment.

6. Night Shift differential has to be on the merit of the Contract. The Contract is for the Night Shift. Whites who worked night shift were given night shift differential. The appellant was not given night shift differential. He is Black.

7. In the instant Case, the Court can do no less than remand for a jury trial on all issues.

Respectfully submitted,

James G. Walker, R.Ph., J.D.
1412 Whittier Place, N.W.
Washington, D.C. 20012

This is to certify that the foregoing was mailed August 3, 1989 postage prepaid to:

Office of the Clerk
United States Court of Appeals
For the Fourth Circuit
United States Courthouse
10th and Main Streets
Richmond, Virginia 23219

Office of Kruchko and Fries
606 Towson Towers
28 West Allegheny Avenue
Baltimore, Maryland 21204

James G. Walker

APPENDIX Z

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1412

JAMES GEORGE WALKER

Plaintiff - Appellant

v.

SUBURBAN HOSPITAL ASSOCIATION; JOAN FINERTY; PAUL QUINN; JAMES GARY; BERNADETTE WELCH; CHARLES STEWART; LLOYD GREEN; DALTON WILLIAMSON; ERIC E. JOHNSON; HEIDI CHRISTL MARCHAND; AESTER HAILU

Defendants - Appellees

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph C. Howard, District Judge. (C/A No. 86-962-JH)

Submitted: August 14, 1989 Decided: September 19, 1989

Before HALL, PHILLIPS, and CHAPMAN, Circuit Judges.

James George Walker, Appellant Pro Se. John Gregory Kruchko (KRUCHKO & FRIES) for Appellee.

PER CURIAM:

In *Walker v. Suburban Hospital Association*, No. 87-3117 (4th Cir. Mar. 25, 1988) (unpublished), we remanded this case for further consideration of Walker's claims under 42 U.S.C. § 1981 and state contract and tort law.[1] On remand, the district court granted defendants' (hereafter "the hospital") motion for summary judgment. We affirm the dismissal of Walker's claims on the basis of the well-reasoned opinion of the district court and the Court's recent decision in *Patterson v. McLean Credit Union*, 57 U.S.L.W. 4705 (U.S. Jun. 15, 1989) (No. 87-107).

Walker, a black pharmacist, first claims that the hospital paid him a lower starting salary than other pharmacists based on race, in violation of § 1981. Under *Patterson*, we must first decide whether this claim is cognizable under § 1981. This inquiry is directed at determining whether the employer's conduct violates Walker's rights in "the making and enforcement of contracts." *Id.* at 4707. We conclude that Walker's allegation states a claim relating to the right to make an employment contract because it concerns conduct in the formation of the contract terms. *Id.*

Of course, Walker must do more than merely state a cognizable claim—he must show purposeful discrimination. *Id.* at 4710. In this respect, Walker has the burden of persuasion, and must establish a prima facie case and rebut any legitimate, nondiscriminatory reason offered

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[1] Walker had also raised claims under 42 U.S.C. § § 1982, 1983, and 1985, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § § 2000e *et seq.*, and the fifth and fourteenth amendments. We affirmed the dismissal of those claims. Slip opinion at p. 2.

by the employer for his conduct. *Id.* at 4711, citing *Texas Dept. Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Without deciding whether Walker has established a prima facie case, we agree with the district court[2] that Walker failed to rebut the hospital's substantial showing that he was paid a lower starting salary because he had minimal previous hospital experience[3] and because he, unlike three of the pharmacists, did not have an advanced pharmacy degree.

Walker also claims that he was paid a lower night-shift differential than night-shift nurses. As with the starting salary claim, we consider this claim to relate to conduct in the formation of the initial contract terms, thus cognizable under § 1981. *Patterson*, 57 U.S.L.W. at 4707. However, Walker's claim fails because, even if we assume that Walker has established a prima facie case, the hospital legitimately offered more money for *nurses* because of a shortage of nurses available to work the night shift and Walker has not rebutted this explanation with any allegation or proof.

Finally, Walker also claims that he was unfairly disciplined because of his race. Specifically, he claims that the disciplinary measures were unwarranted and unevenly imposed. We do not consider this allegation to state a claim that is cognizable under § 1981 because *Patterson*

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[2] The district court did not have the benefit of *Patterson* when it decided this case but applied the *Burdine/Green* framework, which is widely utilized to analyze employment discrimination claims.

[3] According to the hospital, hospital experience, as opposed to drug store experience, was necessary because a pharmacist could only get experience with compounding I.V.'s, TPN mixing and the unit dose system in that setting.

clearly states that § 1981 does not prohibit "conduct after the contract relation has been established, including breach of the terms of the contract and imposition of discriminatory working conditions."[4] *Id.* at 4707. Therefore, Walker is not entitled to relief under § 1981.

Walker also raises a claim that the hospital breached the terms of the employment contract. The district court reviewed the merits of this claim[5] and concluded that the language of the contract clearly refuted Walker's claim. We agree. Review of the employment contract shows that there is no obligation on the hospital to give notice to Walker prior to dismissal. Moreover, we note that Walker was never discharged—he voluntarily refused to return to his job after a seven-day suspension. Therefore, this claim is without merit.

Walker's final claim is that he was improperly exposed to carcinogens in the course of his employment at the hospital. The district court refused to review the merits of this claim because it is based on facts wholly independent of all the other claims. We agree. Before a federal court can review a pendent state law claim, there must be common factual relation between the claims. *See* 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3567.1 at 118-19 (2d Ed. 1984). In this case we perceive no common facts between this claim and Walker's federal claims. Therefore, the district court properly refused to review this claim.

---

[4] The remedy for discriminatory conduct after the formation of the contract lies in Title VII or state contract law. *Patterson*, 57 U.S.L.W. at 4708.

[5] The district court properly reviewed the merits of this state law claim under the doctrine of pendent jurisdiction because it is based on facts common to the § 1981 claim. *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966).

Accordingly, we affirm the dismissal of Walker's claims under § 1981, and state contract and tort law. We dispense with oral argument because the facts and legal contentions are adequately presented on the record before this court and oral argument will not aid the decisional process.

AFFIRMED

APPENDIX AA

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1412

JAMES GEORGE WALKER
Plaintiff-Appellant

v.

SUBURBAN HOSPITAL ASSOCIATION, ET AL
Defendants-Appellees

THE APPELLANT HAVING FILED A PETITION FOR A REHEARING IN BANC NOW BRINGS TO THE ATTENTION OF THE COURT a Document captioned HUMAN RESOURCES dated October 5, 1989.

The following Points are presented:

1. There is a Nationwide shortage of Pharmacists working in hospitals.

2. Pharmacists are among the top 5 most difficult Hospital Employees to recruit and retain according to a 1988 "American Hospital Association Survey."

3. Starting Salaries of Hospital Pharmacists are between 5 and 10 thousand dollars less than Pharmacists employed in Retail Business. The Appellant had both Hospital and Retail experience but was paid less than the White Pharmacists.

4. When Pharmacists are freed from non clinical tasks, they are able to devote more time to clinical tasks, without the necessity of a Pharm. D. Degree.

5. The shortage of Nurses does not affect the quality of patient care according to 67% of 1159 Health Care Chief Executive Officers.

Therefore, there was no valid reason to discriminate against the Appellant on night shift differential.

Respectfully submitted,

James G. Walker, R.Ph., J.D.

This is to certify that the foregoing was mailed November 1, 1989 postage prepaid to:

1. Office of the Clerk
   United States Court of Appeals
   For the Fourth Circuit United States Courthouse
   10th and Main Streets
   Richmond, Virginia 23219

2. Office of Kruchko & Fries
   606 Towson Towers 28 West Allegheny Avenue
   Baltimore, Maryland 21204

James G. Walker

HUMAN RESOURCES

Innovation alleviates pharmacist shortages

Hospitals are trying just about anything to combat the shortage of pharmacists. Some are looking to other industries for recruits. Other hospitals are redistributing work duties. Some are even looking to robotics.

Although pharmacists are among the top five most difficult hospital employees to recruit and retain, according to a 1988 American Hospital Association survey, innovation appears to be easing the crisis.

The competition. More than 40,000 pharmacists are employed outside of hospitals, estimates the American Society of Hospital Pharmacists (ASHP), Bethesda, MD. To better understand who they compete against for pharmacists, hospitals should conduct salary surveys of all entities employing pharmacists, including retailers, says Charles Myers, director, professional practice division, ASHP.

The starting salary of a hospital pharmacist can be $5,000 to $10,000 less than the earnings of a pharmacist employed at the drugstore down the block, Myers says.

"There has been a tendency to think that [retail] is a different market," he says. "But that is not the case, particularly with new graduates. They are particularly influenced by high starting salaries."

Hospitals should design staff development and institutional procedures to attract and more easily train pharmacists not accustomed to working in hospitals, Myers adds. However, he cautions, "even the best staff development and orientation programs wouldn't overcome a big differential in salary."

Pharmacy technicians. Hospitals can also ease pharmacist shortages by placing more emphasis on the duties of pharmacist technicians—a group the AHA survey listed as one of the top five positions most easily recruited. Pharmacy technicians have never been so valuable, Myers says.

When pharmacists are relieved of nonclinical tasks in prescription dispensing, they have more time to advise consumers on nonprescription medication use, consult with patients about use of medications, resolve problems associated with medication orders, and design educational programs to improve medication prescribing, according to the 1989 ASHP report on technical personnel.

At Saint Agnes Medical Center, Fresno, CA, pharmacists relieved of nonclinical tasks devoted time to studying drug dosages—which resulted in savings, says Lloyd Smith, director of pharmacy for the medical center.

A review team at the hospital recognized that medical literature recommended less frequent dosing of the drug Cefazolin. Hospital pharmacists then began encouraging physicians to reduce dosages. As a result, the hospital will save $10,000 annually in drug and supply costs, Smith says.

Automation. To improve productivity and enhance overall efficiency, approximately 35 hospitals have turned to an automated pill dispensing system from the pharmaceuticals division of Baxter Healthcare Corp., Deerfield, IL.

The system reduces labor and material costs generally associated with a unit dose drug dispensing system, according to Steve Clawson, automated tablet control specialist. The system is 99.77 percent accurate and produces hard-to-ignore savings, Clawson says.

Vanderbilt University Hospital and Clinic, Nashville, saves $54,000 annually; Veterans Administration West Side Medical Center, Chicago, saves $102,433; and Presbyterian Hospital, Dallas, saves $72,522.

–Karen Lappa H

CURRENTS

- Top nursing department and human resource executives received a 9.4 percent pay increase for the 12-month period ending Mar. 31, 1989, reports Hospital Compensation Service, Hawthorne, NJ. In hospitals with 300 to 599 beds, nurse executives earn an average of $61,000 annually. Human resource executives earn $52,400.
- Physician and nurse shortages do not affect quality of care, say 67 percent of 1,159 health care CEOs polled by Heidrick and Struggles, Inc., Chicago. Of these CEOs—employed at hospitals and systems with 300 or more beds—19 percent report physician shortages and 91 percent report nurse shortages.

APPENDIX BB

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1412

JAMES GEORGE WALKER
Plaintiff-Appellant

v.

SUBURBAN HOSPITAL ASSOCIATION, ET AL
Defendants-Appellees

THE APPELLANT HAVING FILED A PETITION FOR A REHEARING IN BANC NOW BRINGS TO THE ATTENTION OF THE COURT DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT: No. 89-7032, No. 89-7187

The above Cases parallel the Instant Case.

Respectfully submitted,

/s/ James G. Walker, R.Ph., J.D.
James G. Walker, R.Ph., J.D.

This is to certify that the foregoing was mailed October 12, 1989, postage prepaid to: (1) Office of the Clerk, United States Court of Appeals For the Fourth Circuit, United States Courthouse, 10th and Main Streets, Richmond, Virginia 23219. (2) Office of Kruchko & Fries, 606 Towson Towers, 28 West Allegheny Avenue, Baltimore, Maryland 21204.

/s/ James G. Walker
James G. Walker

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit
September Term, 1989

C.A. No. 88-02554

[Filed Oct 06 1989]

No. 89-7032

Cheryl R. Tatum
Cheryl B. Pressley Parahoo
Sydney M. Boone,

Appellants

v.

Hyatt Hotels Corporation, *et al.*

BEFORE: Wald, Chief Judge; Edwards and D.H. Ginsburg, Circuit Judges.

ORDER

Upon consideration of appellees' motion for summary affirmance, appellants' motions to continue appellate proceedings and for leave to file a surreply, the responses thereto and the replies, it is

ORDERED for the reasons set forth in the accompanying memorandum, that the district court's order be bacated and the case remanded for reconsideration in light of *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989). It is

FURTHER ORDERED that the appellants' motion to continue appellate proceedings be dismissed as moot. It is

FURTHER ORDERED that the motion for leave to file a surreply be denied.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam

MEMORANDUM

Appellees seek summary affirmance of the district court's order dismissing appellants' complaint under Fed. R. Civ. P. 12(h)(3). We vacate the order and remand the case for reconsideration in light of *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989).

The trial court's decision cites *Brown v. D.C. Transit System, Inc.*, 523 F.2d 725 (D.C. Cir.), *cert. denied*, 423 U.S. 862 (1975), but the instant complaint is not foreclosed by *Brown*. In *Brown*, the only issue before this court was whether a private company's policy against "mutton chop" sideburns violated black bus drivers' 5th Amendment rights. We held that as there was no state action, the 5th Amendment could not be implicated. *Brown*, 523 F.2d at 728-29. The district court's ruling that the policy did not violate 42 U.S.C. §1981 was not appealed.

The Washington Post

DISMISSAL OF BIAS SUIT OVER BRAIDS OVERRULED

By Michael York
Washington Post Staff Writer

The U.S. Court of Appeals has ruled that a lower court was wrong to dismiss a lawsuit by three employees of the Hyatt Hotels Corp. who alleged racial discrimination because they were forced to change their braided hairstyles.

The case, decided last Friday, is the latest in a series of decisions that have followed a Supreme Court ruling last spring restricting employees' rights to press racial discrimination claims against their employers.

In the two-paragraph opinion, the appeals court cited the Supreme Court ruling, but suggested that it might not prevent the three employees from suing Hyatt over their hairstyles.

The employees, Cheryl R. Tatum, Cheryl Pressley Parahoo and Sydney M. Boone, claimed that the hotel chain violated their civil rights when it objected to their wearing braids.

Their attorney, Eric Steele, said the employees should be allowed to continue their suit because the Hyatt's rule against braided hairstyles was a part of the original employment agreement.

The Supreme Court case, *Patterson vs. McLean Credit Union*, held that employees could not bring a civil rights case against an employer for racial discrimination that took place after they were hired. The law, the court said, applied only to the "making and enforce[ment]" of contracts.

Brian Harvey, an attorney for the hotel chain, declined to comment.

Of the three employees, only Boone is still employed by Hyatt. She works at the Grand Hyatt in Washington. Parahoo, who was a waitress at the Crystal City Hyatt, resigned.

Steele said both Boone and Parahoo wore wigs after their managers objected to their hairstyles.

Tatum, who worked as a food and drink cashier at the Crystal City Hyatt, was fired after she refused to change her hair, Steele said.

In addition to this lawsuit, Steele said he is considering a broader suit, possibly a class-action case, against local hotels that he said practice various forms of discrimination.

In a similar case, the J.W. Marriott hotel agreed to let Pamela Mitchell, a part-time reservation agent, keep her "cornrow" hairstyle and her job after Mitchell won a decision by the D.C. Office of Human Rights that the hotel's objection to the hairstyle was discriminatory.

Marriott's dress code requires that employees wear neat, businesslike hairstyles. Marriott executives later said they did not consider Mitchell's hairstyle to be "unbusinesslike."

APPENDIX CC

[Filed Nov 26 1989]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1412

JAMES GEORGE WALKER
Plaintiff-Appellant

v.

SUBURBAN HOSPITAL ASSOCIATION; JOAN FINNERTY; PAUL QUINN; JAMES GARY; BERNADETTE WELCH; CHARLES STEWART; LLOYD GREEN; DALTON WILLIAMSON; ERIC E. JOHNSON; HEIDI CHRISTL MARCHAND; AESTER HAILU
Defendants-Appellees

ORDER

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

It is ORDERED that the petition for rehearing and suggestion for rehearing are denied.

Entered at the direction of Judge Hall with the concurrence of Judge Phillips and Judge Chapman.

FOR THE COURT – BY DIRECTION

/s/ John M. Greacen
Clerk

(2)

No. 89-1226

IN THE

Supreme Court Of The United States

October Term, 1989

JAMES GEORGE WALKER,

Petitioner,

v.

SUBURBAN HOSPITAL ASSOCIATION, JOAN FINNERTY, PAUL QUINN, JAMES GARY, BERNADETTE WELCH, CHARLES STEWART, LLOYD GREENE, DALTON WILLIAMSON, ERIC E. JOHNSON, HEIDI CHRISTLE MARCHAND and ASTER HAILU

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

John G. Kruchko
Paul M. Lusky
KRUCHKO & FRIES
28 W. Allegheny Avenue
Suite 606
Baltimore, Maryland 21204
(301) 321-7310
Attorneys for Respondents

Balmar Legal Publishing Division, Washington, D.C., 20005, (202) 682-9800

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IN THE

Supreme Court Of The United States

October Term, 1989

JAMES GEORGE WALKER,

Petitioner,

v.

SUBURBAN HOSPITAL ASSOCIATION, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondents Suburban Hospital Association, et al.,[1] through their undersigned counsel, now state their opposition to the Petition for Writ of Certiorari filed by James George Walker on January 31, 1990. The Petition for Writ of Certiorari should be denied for the following reasons:

(1) The decision of the Fourth Circuit Court of Appeals affirming dismissal of Petitioner's claims is not in conflict with the decision of any other federal court of appeals;

(2) The decision of the Fourth Circuit Court of Appeals affirming dismissal of Petitioner's claims did not decide an important question of federal law which needs to be settled by this Court or which is in conflict with applicable decisions of this Court; and

(3) Petitioner has failed to set forth the points he claims require consideration by this Court with "accuracy, brevity and clearness" so as to facilitate a "ready and adequate understanding" of the alleged grounds for granting the Petition.

[1] The original parties are as indicated on the title page. Respondent Suburban Hospital Association has no corporate affiliates.

STATEMENT OF THE CASE

A. Course of Proceedings Below

Petitioner James G. Walker (hereinafter "Petitioner" or "Mr. Walker") filed his Amended Complaint in this matter on April 24, 1986, bringing eight causes of action against his former employer Suburban Hospital Association and several administrators and supervisors at Suburban Hospital. On May 26, 1987, the United States District Court for the District of Maryland dismissed the entire action. (*See* Appendix D to the Petition for Writ of Certiorari.) The District Court adopted the Reports and Recommendations issued by United States Magistrates Daniel E. Klein, Jr. on February 27, 1989 (Magistrate Klein's opinion is set forth in Appendix A herein at pp. 1a-8a) and by Deborah K. Chasanow on April 29, 1987. (Magistrate Chasanow's 1987 opinion is set forth in Appendix B herein at pp. 1b-4b).

Petitioner appealed the 1987 dismissal of his claims to the United States Court of Appeals for the Fourth Circuit. On March 25, 1988, the Court of Appeals reversed the District Court's decision with respect to Petitioner's 42 U.S.C. § 1981 discrimination claim and his pendent state causes of action for breach of contract and exposure to carcinogenic substances. (*See* Appendix E to the Petition for Writ of Certiorari). The Court of Appeals overturned the District Court's judgment that Petitioner's suit under Title VII precluded a simultaneous suit under § 1981 and held instead that Title VII did not provide the exclusive remedy for Petitioner's discrimination claims.

Following the Fourth Circuit's remand, Respondents answered the Amended Complaint and took Petitioner's deposition. Respondents filed a motion for summary judgment on October 14, 1988. On December 13, 1988, United States Magistrate Deborah K. Chasanow recommended that Respondents' motion for summary judgment be granted as to Petitioner's § 1981 claim and as to Petitioner's contract claim or, in the alternative, that the contract claim be dismissed along with the tort claim because the District Court need not exercise jurisdiction over Petitioner's pendent state claims. (*See generally*, Report and Recommendation of Magistrate Chasanow set forth herein as Appendix C at pp. 1c-20c). On December 27, 1988, United States District Court Judge Joseph C. Howard affirmed and adopted the

Magistrate's recommendations including the Magistrate's suggestion that summary judgment be granted to Respondents on Petitioner's contract claim. (*See* Judgment Order of United States District Court Judge Joseph C. Howard as set forth in Appendix W to the Petition for Writ of Certiorari).

Again, Petitioner appealed the dismissal of his Amended Complaint. On September 19, 1989, the Fourth Circuit Court of Appeals affirmed the District Court's dismissal of Petitioner's claims "on the basis of the well-reasoned opinion of the District Court" and the Supreme Court's decision in *Patterson v. McLean Credit Union*, ___ U.S. ___, 109 S. Ct. 2363 (1989). (*See* Appendix Z to the Petition for Writ of Certiorari). The Fourth Circuit held that Petitioner's starting salary claim and his shift differential claim were cognizable under § 1981 because these discrimination claims related to conduct in the formation of the initial contract terms. (*See* Appendix Z to the Petition for Writ of Certiorari, pp. 110a-111a). The Court of Appeals concluded, however, that the District Court had correctly dismissed Petitioner's starting salary and shift differential claims because Petitioner had failed to rebut the "legitimate, non-discriminatory reasons" offered by Suburban Hospital for paying Petitioner a lower starting salary than certain white pharmacists and for paying him a night shift differential that was less than that paid to nurses on the night shift. (*Id.*)

With respect to Petitioner's claim that he was unfairly disciplined because of his race in violation of § 1981, the Court of Appeals held that the Court's decision in *Patterson v. McLean Credit Union* warranted dismissal of this portion of Petitioner's action because the Court stated in *Patterson* that § 1981 does not prohibit "conduct after the contract relation has been established, including breach of the terms of the contract and imposition of discriminatory working conditions". (*See* Appendix Z to the Petition for Writ of Certiorari, pp. 111a - 112a). The Court of Appeals also affirmed the District Court's conclusion that the language of Petitioner's employment contract "clearly refuted" Petitioner's breach of contract claim. Finally, the Fourth Circuit concluded that the District Court properly refused to review the merits of Petitioner's "exposure to carcinogens" claim because it was based on facts "wholly independent of all the

other claims". (*See* Appendix Z to Petition for Writ of Certiorari, p. 112a).

Petitioner's petition for rehearing and suggestion for rehearing in banc was denied on November 26, 1989. (*See* Appendix CC to the Petition for Writ of Certiorari).

B. Relevant Facts Underlying Dismissal of Petitioner's Claims

Petitioner has set forth a distorted statement of facts in his Petition. The facts which were relevant to the District Court's initial dismissal of Petitioner's complaint in 1987 and its subsequent grant of summary judgment to Respondents in 1989 are set forth in detail in the Reports and Recommendations of Magistrate Chasanow. (*See* Appendix B and Appendix C herein at pp. 1b-2b and pp. 5c-19c respectively). These facts are summarized below:

James G. Walker applied for employment at Suburban Hospital on March 23, 1984. The Hospital is a private non-profit corporation which has received federal funds as a result of its participation in the Hill-Burton Act construction program. It also receives funds in the form of medicare and medicaid payments.

At the time of Petitioner's application for employment as a pharmacist, Suburban Hospital had been advertising for a pharmacist to work full time nights. It sought a pharmacist with hospital experience including experience with I.V. admixture, TPN mixing and the unit dose system ("UD"). The Hospital wanted candidates for the night pharmacy position with previous hospital experience rather than "drug store" experience.

In 1984, Suburban Hospital applied a salary scale to each position at the Hospital. This scale was divided into eight octiles by which employees were assigned starting salaries according to their experience and level of education. In evaluating Petitioner's qualifications and assigning a starting salary, the Hospital noted that Mr. Walker had only three months hospital experience as a pharmacist.

The Hospital paid Mr. Walker and other night pharmacists a shift differential for working on the night shift. The shift differential paid to the pharmacists was less than that paid to the nurses and LPNs working on the night shift because the Hospital was having a hard time

recruiting nurses for the night shift. Thus, the Hospital offered the higher incentive to recruit and retain nurses for the night shift work.

When Mr. Walker began his employment on the Hospital's night shift, he signed an employment agreement relating to his hours of work on the night shift. This agreement included a 30 day notice provision whereby the Hospital agreed to give the employee a minimum of 30 days notice if it decided to discontinue the scheduling set forth in the night pharmacist agreement. This agreement did not cover grounds for employee discipline, suspension or discharge. (*See* "Employment Agreement-Night Pharmacist" set forth as Appendix Q in the Petition for Writ of Certiorari at pp. 63a - 64a).

On January 8, 1986, Petitioner was disciplined for refusing to code an I.V. card after being ordered to do so by his supervisor, Eric Johnson. Although Mr. Walker believed that the coding was "just paperwork" and "flunky work", the coding was used to generate the charges for the I.V.'s prepared by the pharmacists and was necessary for billing purposes. His supervisors had circulated memoranda on the importance of coding and held meetings regarding coding.

Mr. Walker went to another supervisor, Dalton Williamson, and complained about having to do the coding. Mr. Williamson responded that Mr. Walker would have to do his own coding and he would also have to do what Mr. Johnson said. Mr. Walker's response to Mr. Williamson was: "In a pigs eye. It will be coded when you all do it."

The next day, Mr. Walker was called to Mr. James Gary's office, the Director of Pharmacy, where he, Dalton Williamson and Mr. Gary discussed his conduct on the previous day. Mr. Gary told him that he would have to do the coding and would have to listen to what Eric Johnson said and if there were any problems, to bring the problems up to him. After an exchange of "words", Mr. Walker told Mr. Gary that he was not going to do as he was told.

On February 19, 1986, Petitioner was placed on probation for continuing to refuse to perform his job responsibilities and insubordination. Petitioner was not clocking in orders as required by pharmacy procedure and he was not dispensing medication to the patients of the Hospital on a timely basis. The memorandum placing Petitioner on probation also discussed the fact that he was still failing to do the coding and other paperwork at night. The probation memorandum

memorialized Mr. Walker's refusal to complete profiling procedures and check I.V. Admixture solutions that were compounded on his shift. The probation memorandum instructed Mr. Walker to begin following all policies and procedures of the department including clocking in physician orders, profiling all medicine orders correctly on the I.V. charge profile card, and following the orders and instructions of his supervisors. Mr. Walker refused to sign the probation memorandum and told his supervisors that he was not going to take any more orders from them.

The very next day, Petitioner was suspended for four days when he did not check the I.V. solutions that were compounded on his evening shift. Mr. Walker admits that he did not check the I.V.'s but claimed he was too busy. He told his supervisors: "[G]o back and check it [your]selves".

On February 25, 1986, Petitioner was sent a registered letter confirming his suspension and notifying him that he was to return to work on March 3, 1986. Petitioner received the registered letter on February 27, 1986. Petitioner did not return for work on March 3rd, nor did he notify anyone at Suburban Hospital that he would not be returning to work. When he did not report for work, he was terminated for abandoning his job.

ARGUMENT

A. Petitioner Has Failed to Clearly Articulate Reasons Which Would Justify Granting the Writ.

As mentioned above, the Petition for Writ of Certiorari fails to set forth the reasons underlying Petitioner's request for a writ in a manner that allows a clear understanding of the points requiring consideration by the Court. This deficiency is in itself grounds for a denial of the writ. *See* Rule 21.5 of the Supreme Court Rules. Petitioner appears to be asking the Court to make a determination as to the merits of his claims rather than review the application of law underlying the Fourth Circuit's decision in this case. The jurisdiction of the Supreme Court cannot be invoked in the manner proposed by Petitioner.

Respondents concede that the section in the Petition entitled "Reasons for Granting the Writ" contains a "laundry" list of constitu-

tional provisions and federal statutes which Petitioner apparently claims were misapplied by the District Court and the Court of Appeals. As will be demonstrated below, however, none of Petitioner's claims in this respect merit review by the Court in this case.

B. The Fourth Circuit's Decision In This Case Is Not In Conflict With Other Decisions By Federal Courts Of Appeals Or With Decisions Of The Supreme Court.

Petitioner claims that the Fourth Circuit's decision is in conflict with a recent decision by the United States Court of Appeals for the District of Columbia. He also claims the Court of Appeals' affirmance of the District Court's decision in this case was in error because the District Court's decision was at variance with certain decisions of the Supreme Court. In each instance, Petitioner fails to establish any such conflict.

1. There is No Conflict Between the Fourth Circuit's Decision in this Case and the Decision of the Court of Appeals for the District of Columbia in *Tatum v. Hyatt Hotels Corporation.*

Petitioner argues that the Court of Appeal's decision in this case is in conflict with an unpublished decision of the Court of Appeals for the District of Columbia Circuit captioned *Tatum v. Hyatt Hotels Corp., et al.*, No. 89-7032 (D.C. Cir. Oct. 6, 1989). (*See* Appendix BB in the Petition for Writ of Certiorari). As explained above, the Fourth Circuit applied the Court's rationale in *Patterson v. McLean Credit Union* to affirm the dismissal of Petitioner's claim that he was unfairly disciplined because of his race in violation of 42 U.S.C. § 1981. The Fourth Circuit's opinion correctly applied the *Patterson* decision because the discriminatory conduct claimed by Petitioner occurred after the contractual relationship had been established and therefore was not actionable under § 1981. The Court in the *Patterson* decision stated that § 1981 does not prohibit "conduct after the contract relation has been established, including breach of the terms of the contract and imposition of discriminatory working conditions". 109 S. Ct. at 2373.

The District of Columbia Circuit's decision cited by Petitioner did not apply the Court's *Patterson* decision in a manner which is in conflict with the Fourth Circuit Court of Appeals' decision in this case.

In fact, the District of Columbia Court of Appeals' decision did not apply *Patterson* at all but merely directed a remand of the case at issue for a decision by the district court "in light of *Patterson v. McLean Credit Union*". (*See* Appendix BB in the Petition for Writ of Certiorari, p. 121a).

Further, it appears from the materials contained in Appendix BB to the Petition that the *Tatum v. Hyatt Hotels Corp.* case involved a hairstyle policy in place at the time of the hiring of the plaintiff/employees by Hyatt Hotels Corporation. Therefore, even assuming that the District of Columbia district court concluded that a discharge for violation of the hotel's hairstyle policy was cognizable under § 1981, such a decision would not be in conflict with the Fourth Circuit's application of *Patterson* to the claim of discriminatory discipline by Petitioner in this case.

2. There is No Conflict Between *Patterson v. McLean Credit Union* and *Meritor Savings Bank v. Vinson.*

Petitioner claims the Court should clarify its decision in *Patterson v. McLean Credit Union* with its decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), but he fails to illustrate where the conflict exists. In fact, no clarification is needed.

Patterson v. McLean Credit Union involved a ruling by the Court that racial harassment was not cognizable under 42 U.S.C. § 1981. The Court's decision in *Meritor Savings Bank v. Vinson* involved a claim of sexual harassment under Title VII. There is absolutely no conflict between these decisions. The *Patterson* decision explicitly states that a claim of racial harassment is properly brought under Title VII and not § 1981. There was no § 1981 claim at issue in the *Meritor Savings Bank v. Vinson* decision. Thus, Petitioner's claim that there is a need to "clarify" a conflict between these two decisions is specious.

3. There Is No Conflict Between The Decision In This Case And *Hishon v. King & Spalding.*

Petitioner argues that the District Court's grant of summary judgment in this case is at odds with the Supreme Court's opinion in *Hishon v. King & Spalding*, 467 U.S. 69 (1984). Specifically, Petitioner makes reference to the Court's statement that "a benefit that

is part and parcel of the employment relationship may not be doled out in a discriminatory fashion..." Id. at 75. The District Court's conclusion in this case that there was no discrimination in the payment of starting salary or shift differential by Suburban Hospital can not be construed as a failure to recognize the principle elucidated by the Court in *Hishon* that discrimination can be made out by the uneven application of benefits. Rather, the District Court determined, as it had a right to do under Rule 56 of the Federal Rules of Civil Procedure, that Petitioner had not established that there was a genuine issue of material fact in dispute with respect to Suburban Hospital's application of wages and benefits to its employees.

The District Court found that Suburban Hospital did not discriminate in payment of a starting wage and shift differential. Thus, the District Court's opinion and the Fourth Circuit's affirmance of that decision, is consistent with, and not contrary to, the rationale in *Hishon v. King & Spalding*. The Magistrate addressed Petitioner's reference to *Hishon v. King & Spalding* in her decision, stating: "There is nothing in [the *Hishon* case] to contradict the reasoning set forth above. Plaintiff has failed to show that he was similarly situated with those who received higher starting salaries." (*See* Appendix C herein, at p. 9c).

4. There is No Conflict Between the Decision in This Case and *Watson v. Fort Worth Bank and Trust.*

Petitioner's citation to *Watson v. Fort Worth Bank and Trust*, ___ U.S. ___, 108 S. Ct. 2777 (1988), and the Court's conclusions therein with respect to disparate impact analysis under Title VII, has no application to Petitioner's claims under 42 U.S.C. § 1981. The District Court correctly found that § 1981 can only be violated by purposeful discrimination and it does not reach disparate effects alone. (*See* Appendix C herein, at p. 5c, n. 4, *citing General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 390-91 (1982)). Additionally, although the District Court conceded that "disparate impact may be relevant to a § 1981 claim", (*Id.*), Petitioner made no attempt to establish a statistical disparity between the racial composition of pharmacists at Suburban Hospital as compared with nurses and LPN's at the Hospital. Additionally, as noted by the Court of Appeals:

"The Hospital legitimately offered more money for *nurses* because of a shortage of nurses available to work the night shift and Walker has not rebutted this explanation with any allegation or proof." (*See* Appendix Z to the Petition for Writ of Certiorari, p. 111a).

Thus, even if a disparate impact analysis had been applied to Petitioner's claims, the facts below establish that Suburban Hospital's shift differential policy "serves, in a significant way, the legitimate employment goals of the [Hospital]". *See Wards Cove Packing Co., Inc., v. Atorio*, ___U.S.___ , 109 S. Ct. 2115, 2125-26 (1989) *citing Watson v. Fort Worth Bank & Trust* Co., ___ U.S. ___, 108 S. Ct. 2777 (1988). "[T]he ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." *Id.* at 2126, *citing Watson*. The Court of Appeals concluded that Petitioner did not carry his burden of persuasion. This conclusion would be correct under any theory of discrimination and the Court of Appeals' opinion is therefore consistent with the *Watson v. Fort Worth Bank and Trust Co.* decision.

5. There is No Conflict Between the Decision in This Case and *Martin v. Wilks*

Petitioner makes reference to the "Birmingham, Alabama Firefighters Case" and claims that the District Court's decision conflicts with the "tenet of law" allegedly established in that case, i.e., that "blacks who had less seniority could not be promoted over whites who had more seniority". (*See* Petition, pp. 6-7). He alleges that he had more "seniority" than white pharmacists and thus should have been paid a higher base salary.

Respondents assume that Petitioner is referring to the Court's decision in *Martin v. Wilks*, ___U.S.___, 109 S. Ct. 2180 (1989), when he "cites" the "Birmingham, Alabama Firefighters Case". The *Martin v. Wilks* decision stands for the principle that a consent decree between an employer and certain minority employees providing for affirmative action in hiring and promoting the minority employees could be challenged by non-minority employees in a reverse discrimination suit. The decision involves an analysis of proper judicial procedure and not the substantive rights of more "senior" employees *vis-a-vis* less "senior" employees. There is absolutely no conflict between the *Martin v. Wilks* decision and the instant case.

Furthermore, Petitioner raises the issue of "seniority" even though his seniority or his eligibility for a promotion were not even at issue in this litigation. Petitioner's discrimination claim involved an allegation that the starting salary paid to Petitioner at Suburban Hospital discriminated against him because of his race. The term "seniority", however, relates to years of service with Suburban Hospital and it had absolutely nothing to do with the Hospital's determination as to what starting salary to give new employees. Suburban Hospital determined its starting rates for new pharmacists by crediting hospital experience at other institutions and evaluating the degree of pharmacy education each applicant possessed. The Magistrate characterized the Hospital's practice as "an entirely reasonable manner of setting starting salaries" and "a common practice in the business world". (*See* Appendix C herein, pp. 7c-8c). There was absolutely no allegation in this litigation that Petitioner was given a lower raise than other pharmacists as he progressed through the salary scale. Petitioner raises the seniority issue simply because he could not rebut the clear evidence that all the white pharmacists he points to as having received a higher starting salary also possessed considerably more hospital experience than Petitioner while others possessed doctorate degrees which he had not obtained. The Court should not review the Fourth Circuit's decision in this case on the basis of this "phantom" issue of seniority.

C. The District Court's Dismissal of Claims Based on 42 U.S.C. §§ 1982, 1983 and 1985, Title VII and the Fifth and Fourteenth Amendments was not in Conflict with Applicable Decisions of the Supreme Court.

As mentioned, all of Petitioner' claims were dismissed in May, 1987. (*See* Appendix D to the Petition for Writ of Certiorari and Appendix A and B herein). The Court of Appeals, on March 25, 1988, reversed only as to Petitioner's § 1981 and pendent state claims. Petitioner now makes a rather oblique and convoluted attack on the reasoning of the District Court in an attempt to revive his Title VII claim, his claims under 42 U.S.C. §§ 1982, 1983 and 1985 and his claims under the fifth and fourteenth amendment. As argued below, the dismissal of these claims was consistent with applicable law.

1. Petitioner's 42 U.S.C. § 1982 Claim Was Clearly Insufficient as a Matter of Law.

The District Court properly found Petitioner's § 1982 claim to be legally inapplicable. It is well established that the limited purpose of § 1982 is to provide a cause of action for racial discrimination in the sale, leasing and inheritance of real and personal property. *Jones v. Mayer Co.*, 392 U.S. 409, 420 (1968). It is not an appropriate jurisdictional foundation for an employment discrimination claim. *Abel v. Bonfanti*, 625 F. Supp. 263, 269 (S.D. N.Y. 1985). Petitioner's claim that "property denotes a broad range of interest" so as to allow § 1982 to encompass the payment of wages is unsupported by applicable law.

2. The Fifth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983 Cannot Support a Cause of Action Where State Action is Not Present.

Petitioner's claims under 42 U.S.C. § 1983 and under the fifth and fourteenth amendments to the United States Constitution were also properly dismissed by the District Court without reaching the merits of Petitioner's allegations. A requisite element for maintaining a cause of action based upon 42 U.S.C. § 1983 and the fifth and fourteenth amendments is government action. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982); *Nixon v. Condon*, 286 U.S. 73, 83 (1932); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972). Petitioner's Amended Complaint was completely devoid of any factual allegation or legal foundation demonstrating this "state action."

Although Petitioner asserted that the receipt of federal funds created sufficient governmental affiliation to make Suburban Hospital a state actor, this argument was contrary to settled case law. *Modaber v. Culpeper Memorial Hospital, Inc.*, 674 F.2d 1023, 1026 (4th Cir. 1982); *Carter v. Norfolk Community Hospital Ass'n*, 761 F.2d 970, 972 (4th Cir. 1985); *See also Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978) *cert. denied*, 442 U.S. 947 (1979) (Receipt of medicare and medicaid funds does not fulfill the state action requirement for claims based on § 1983, fifth and fourteenth amendments). Thus, the Fourth Circuit's affirmance of the District Court's dismissal of Petitioner's § 1983 claim and his claims under

the fifth and fourteenth amendments is consistent with applicable decisions of the Supreme Court.

3. Petitioner's Claim Based On 42 U.S.C. § 1985 Was Not Well Grounded in Fact Nor Warranted By Existing Law

Petitioner's assertion that 42 U.S.C. § 1985 provided jurisdiction for his discrimination claims was patently frivolous. His Amended Complaint lacked any specific facts which might substantiate his § 1985 conspiracy claim. Petitioner pled no facts showing either the nature or the purpose of the conspiracy, nor did he assert any overt acts taken in furtherance of the conspiracy, nor did he show the deprivation of rights which resulted because of the conspiracy. Merely asserting a conspiracy without the requisite facts and details of a conspiracy is completely inadequate to support a § 1985 claim. *Picking v. State Finance Corp.*, 332 F. Supp. 1399, 1402-03 (D. Md. 1971). This cause of action was correctly dismissed by the District Court.

4. Petitioner Did Not Exhaust His Administrative Remedy Prior to Filing His Title VII Claim and Thus, it was Properly Dismissed.

The District Court correctly ruled that it had no jurisdiction to decide Petitioner's Title VII claim where Petitioner did not exhaust his administrative remedy prior to bringing suit. (*See* Appendix A herein, p. 6a and Appendix D to the Petition for Writ of Certiorari, pp. 12a & 14a). Petitioner clearly failed to satisfy the statutory prerequisite for bringing a Title VII action in federal court. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). Petitioner's citation to *Bowen v. City of New York*, 476 U.S. 467 (1986), as support for a "bypass of exhausting administrative remedies" is specious.

D. The District Court's Decision to Grant Summary Judgment to Respondents on Petitioner's § 1981 Discrimination Claims, on his Breach of Contract Claim and on his Tort Claim is not in Conflict with Applicable Decisions of This Court.

The District Court found Petitioner's § 1981 discrimination claims, his breach of contract claim, and his tort claim to be totally without merit. The Court of Appeals agreed with the District Court's

appraisal of Petitioner's claims in its opinion issued September 19, 1989. Petitioner's attack on the reasoning of the courts below does not establish that either the decision of the District Court or the Court of Appeals was in conflict with applicable laws.

1. Petitioner Failed To Make Out A Prima Facie Case of Discrimination Under 42 U.S.C. § 1981.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Supreme Court outlined the general requirements for establishing a *prima facie* case of employment discrimination in hiring. Petitioner was unable to make out a *prima facie* case of racial discrimination in proceedings before the District Court. In ruling on Respondents' Motion for Summary Judgment, Magistrate Chasanow found Petitioner's evidence to be a "meager attempt to establish a *prima facie* case of employment discrimination." (*See* Appendix C, at p. 3c.) After a thorough inquiry into the substance of Petitioner's allegations, the Magistrate concluded: "Plaintiff's unsupported allegations...cannot stand." (*Id.*)

Specifically, Petitioner's assertion that his starting salary was indicative of discrimination because it was lower than other new hires was found to be groundless. The Magistrate stated: "Plaintiff has failed to show that he was similarly situated to the white pharmacists who were hired after him and who received higher salaries." (*Id.* at 6c.) Additionally, the Magistrate concluded that the evidence submitted by Petitioner did not establish that Respondents' reasons for their actions were a pretext for discrimination. (*Id.* at 7c.) The Court of Appeals agreed with the Magistrate stating that "Walker failed to rebut the hospital's substantial showing that he was paid a lower salary because he had minimal previous hospital experience and because he, unlike three other pharmacists, did not have an advanced pharmacy degree." (*See* Appendix Z in the Petition for Writ of Certiorari, at p. 111a.)

Likewise, Petitioner failed to satisfy his burden of establishing a *prima facie* case of discrimination with respect to his night differential pay claim. (*See* Appendix C herein, at p. 10c.) Petitioner was paid shift differential for working the night shift, but registered nurses received higher night differential than did pharmacists. The Magistrate found that Petitioner's assertion that this was a racially discriminatory practice was without merit. The Magistrate said: "Nur-

ses and pharmacists...are not performing the same duties and cannot be considered similarly situated". (*Id.* at 12c.) The Court of Appeals also found that Petitioner's shift differential claim failed because he had not rebutted the Hospital's showing that nurses were offered more money to work the night shift because of a shortage of nurses. (*See* Appendix Z in the Petition for Writ of Certiorari at p. 111a.)

Petitioner's allegations of discriminatory discipline and discharge were also devoid of factual support. The Magistrate said: "The first and foremost reason that Plaintiff cannot prove a discriminatory discharge is that he was not discharged and his suspension was not a constructive discharge." (*See* Appendix C herein, at p. 13c.) The Magistrate also found that Petitioner's claim that his suspension was motivated by discrimination was successfully rebutted by Respondents: "The record is replete with evidence of Plaintiff's admitted insubordination towards his supervisors and his deliberate disregard of hospital policies". (*Id.* at 14c.)

Thus, as revealed through Magistrate Chasanow's analysis, the record clearly demonstrated that Petitioner's § 1981 claim was factually groundless, containing only conclusory allegations, and ultimately failing in its attempt to establish a *prima facie* case of discrimination. The District Court's decision to grant summary judgment to Respondent on Petitioner's § 1981 claims was consistent with applicable decisions of the Court. The Court of Appeals decision, based as it is on the reasoning of the District Court and a correct application of *Patterson v. McLean Credit Union*, should not be reviewed by the Court.

2. Petitioner's Breach of Contract Claim was Properly Dismissed by the District Court.

Magistrate Chasanow examined the factual basis for Petitioner's breach of contract cause of action and found it based on an erroneous premise that he had a contract with Suburban Hospital that entitled him to 30 days notice prior to suspension. The Magistrate found that the plain language of the documents upon which Petitioner relied for his contract claim "categorically refuted any contention that a contractual employment relationship existed between Plaintiff and Suburban Hospital." (*See* Appendix C, herein at p. 19c.) The Hospital's reservation of its right to discontinue the alternating workweek schedule

upon thirty (30) days notice in the Night Pharmacist Employment Agreement could not reasonably be construed to require notice to individuals suspended for insubordination and violations of Hospital policy. The Court of Appeals' affirmance of the District Court's findings on the contract claim was a proper exercise of its appellate jurisdiction. (*See* Appendix Z to the Petition for Writ of Certiorari, p. 112a).

3. The District Court Properly Applied the Doctrine of Pendent Jurisdiction in Dismissing Petitioner's Tort Claim.

Magistrate Chasanow concluded that Petitioner's tort claim did not meet the test set out in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), for the exercise of pendent jurisdiction. (*See* Appendix C herein, at p. 19c.) Petitioner had alleged that he was exposed to carcinogens during his employment at Suburban Hospital and he sued "for the speculative possibility that this exposure may cause him to get cancer, or may adversely affect any children he may have in the future." (*Id.*) The Magistrate concluded that this tort claim had an "insufficient connection" with Petitioner's § 1981 claims. (*Id.*)

The Court of Appeals agreed with the Magistrate's reasoning, perceiving "no common facts between [the tort] claim and Walker's federal claims". (*See* Appendix Z to the Petition for Writ of Certiorari, p. 112a). Nothing contained in the Petition even remotely demonstrates a nexus of common facts between the tort claim and Petitioner's other claims. Thus, the decision to dismiss was consistent with applicable decisions of the Supreme Court and it should not be reviewed by way of a Petition for Certiorari.

CONCLUSION

For all the foregoing reasons, the Court should deny the Petition for Writ of Certiorari in this case.

Respectfully submitted,
John G. Kruchko
Paul M. Lusky
KRUCHKO & FRIES

By:_____
John G. Kruchko

Counsel for Respondents Suburban Hospital Association, et al.

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES GEORGE WALKER

v.

SUBURBAN HOSPITAL ASSOCIATION, ET AL

CIVIL ACTION NO.: JH-86-962

MEMORANDUM AND ORDER

On March 24, 1986, plaintiff, James George Walker filed a *pro se* civil action naming as defendants Suburban Hospital Association [Suburban], Joan Finnerty, Paul Quinn, James Gary, Bernadette Welch, Charles Stewart, Lloyd Green, Dalton Williamson, Eric Johnson, Heidi Marchand, and Aester Hailur. By virtue of an order dated April 7, 1986, plaintiff was required to amend his complaint to set forth the bases for this Court's jurisdiction and to particularize one of his claims. (Paper No. 2). Plaintiff filed his amended complaint on April 16, 1986, stating that his claims arise under 42 U.S.C. §§1981, 1982, 1983, and 1985, the Fifth and Fourteenth Amendments, and 42 U.S.C. § 2000e. (Paper No. 3). On May 27, 1986, defendants filed a motion to dismiss (Paper No. 6), to which plaintiff responded on June 2, 1986. (paper No. 8). Also pending are defendants' motion to compel discovery (paper No. 18). No hearing is deemed necessary. Local Rule 6.

In his amended complaint, plaintiff alleges the following course of events:

1. On May 16, 1984, plaintiff, a black male, signed a contract with defendant Suburban for employment as a night pharmacist. The contract provided that defen-

dant Suburban would have to provide plaintiff with thirty days notice before dismissal.

2. On August 13, 1984, defendant Suburban hired defendant Marchand, a white female, at a higher salary than plaintiff. Later, defendant Marchand was given a retroactive pay raise.

3. On March 20, May 30, July 15, and September 9, 1985, other white pharmacists were hired by defendant Suburban at higher pay rates than plaintiff.

4. On September 23, 1985, plaintiff wrote to defendant Gary about the hazards of working with carcinogens and about certain pay disparities.

5. On October 30, 1985, defendant Marchand put an accusatory statement in plaintiff's file, and plaintiff was not given an opportunity for rebuttal.

6. On January 8, 1986, defendant Johnson advised plaintiff to place codes on cards. Plaintiff asked a technician to do it, and she refused. When he reported the incident to defendant Williamson, plaintiff was told that plaintiff was not the technician's boss and that plaintiff must code the cards.

7. On January 9, 1986, plaintiff met with defendants Gary and Williamson. Defendant Gary refused to hear evidence about other pharmacists' failure to code cards. Defendant Williamson then gave plaintiff a disciplinary document.

8. On January 9, 1986, defendant Quinn was informed of the incident of January 8. He "appeared to indicate" that he and defendant Welch agreed with the actions of defendants Gary and Williamson.

9. On February 5, 1986, defendant Hailur attempted to get plaintiff to sign a document concerning his job responsibilities.

10. On February 19, 1986, defendant Johnson accused plaintiff of being incompetent.

11. On February 21, 1986, defendant Johnson suspended plaintiff, and defendant Welch confirmed the suspension.

12. Defendant Stewart is the Assistant Administrator of Finance for defendant Suburban, and defendant Green is defendant Welch's supervisor.

As relief, plaintiff seeks compensatory and punitive damages in the amount of $100 million from defendant Suburban and in the amount of $15 million from each of the other defendants. Plaintiff also requests that defendant Suburban be held responsible for all future damages that he and his unborn children may suffer as a result of his work with carcinogens.

As grounds for dismissal, the defendants contend that, considering the jurisdictional bases propounded, plaintiff has failed to state a claim upon which relief may be granted. A large part of the difficulty in interpreting plaintiff's complaint is that he has not set forth precisely which conduct he complains of violated which federal statutory or constitutional protection.

Plaintiff first claims that the defendants have violated his rights under 42 U.S.C. § 1983. Section 1983 only applies to actions taken "under color of" state law. Defendants assert that plaintiff's complaint should be dismissed because he has not alleged that the defendants were state actors. It is clear that *pro se* complaints must be construed liberally. *Haines v. Kerner*, 404 U.S. 519, 520-21, *reh'g denied*, 405 U.S. 948 (1972). Thus, it should be presumed that a *pro se* plaintiff alleges all statutory prerequisites, including that the defendants were acting under color of state law. The onus is then on the defendants to come forward and present evidence that they were not state actors. Defendants' one sentence assertion in their motion that Suburban is a private corporation is not sufficient to meet the defendants' burden. Affidavits from the parties that they were not acting under color of state law at any time relevant to the instant claim are necessary. Therefore, the defendants' motion to dismiss as to § 1983 will be denied at this time, and they will be given twenty days to file a motion for summary judgment with appropriate supporting documents.

On the other hand, the undersigned cannot determine from the complaint the facts plaintiff is relying on to support his claim under §

1983. Accordingly, plaintiff will be given twenty days from the date of the attached order to set forth with particularity the facts which serve as a basis for his § 1983 claim and the federal rights he feels were violated.

Secondly, plaintiff contends that defendants violated 42 U.S.C. § 1985(3), which provides:

> If two or more persons in any state or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . [and] if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the parties so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the Supreme Court held that, to maintain action under the statute, the plaintiff

> must allege that the defendants did (1) "conspire . . ." (2) "for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." It must then assert that one or more of the conspirators (3) did, or caused to be done, "any act in furtherance of the object of [the] conspiracy," whereby another was (4a) "injured in his person or property" or (4b) "deprived of having and exercising any right or privilege of a citizen of the United States."

Id. at 102-03. The Court stated that "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102 (footnote omitted). However, it reserved the question of what discriminatory factors other than race would be actionable under §1985(3). *Id.* at 102 n.9. In a recent case, *United Bhd. of Carpenters & Joiners of Am. v. Scott*, 463 U.S. 825, *reh'g denied*, 464 U.S. 875 (1983), the Supreme Court found that

§ 1985(3) did not "reach conspiracies motivated by economic or commercial animus." *Id.* at 838.

In the instant complaint, plaintiff has failed to clearly and concisely plead facts relative to each element of a § 1985(3) claim. Again, because of the requirement that *pro se* complaints be construed liberally and because particularization is preferred over dismissal of *pro se* actions, *Coleman v. Peyton*, 340 F.2d 603, 604 (4th Cir. 1965), plaintiff will be given twenty (20) days to present facts in support of each element of his § 1985(3) claim.

Plaintiff's third allegation is that the defendants violated his rights under the Fifth and Fourteenth Amendments. However, unless the defendants are federal (Fifth Amendment) or state (Fourteenth Amendment) actors, they cannot be sued directly under those constitutional amendments. As with plaintiff's § 1983 claim, the defendants must affirmatively plead and present affidavits that they are not federal or state actors. Moreover, plaintiff has again failed to specifically state the factual basis for these contentions. Therefore, the defendants will be given twenty (20) days to file a motion for summary judgment with appropriate supporting documents, and plaintiff will be given twenty (20) days to particularize his claim.

Next, plaintiff asserts that the defendants violated his rights guaranteed by 42 U.S.C. § 1981. That statute provides that all persons, regardless of race, shall have equal rights under the laws. Its protections have been determined to apply to instances of racial discrimination in private employment. *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975). *Patterson v. American Tobacco Co.*, 535 F.2d 257, 270 (4th Cir) *cert. denied*, 429 U.S. 920 (1976); *Moore v. Inmont*, 608 F.Supp. 919, 925 (W.D.N.C. 1985); *Hudson v. Charlotte Country Club, Inc.*, 535 F.Supp. 313, 315. (W. D.N.C. 1982). In order to state a claim under § 1981, a plaintiff must "offer evidence showing a discriminatory animus by the defendant in terminating the employment," *Moore*, 608 F.Supp. at 927, or as a factor in the employment situation complained of. In the instant case, plaintiff has not specifically alleged what acts of the defendants he considers to have been the products of race discrimination. Plaintiff will therefore be given twenty (20) days to particularize his claim under § 1981.

Plaintiff's fifth claim is that the defendants have violated his rights under 42 U.S.C. § 1982, which provides that all persons "shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." The statute prohibits racial discrimination in the sale, leasing, and inheritance of real and personal property, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 421-22 (1968), and has been held not to apply to employment discrimination claims *Abel v. Bonfanti*, 625 F.Supp. 263, 269 (S.D.N.Y. 1985); *Evans v. Meadow Steel Products, Inc.*, 572 F.Supp. 250, 253 (N.D.Ga. 1983); *Johnson v. Duval County Teachers Credit Union*, 507 F.Supp. 307, 310 (M.D.Fla. 1980); *Foreman v. General Motors Corp.*, 473 F.Supp. 166, 177 (E.D.Mich. 1979); *Krieger v. Republic Van Lines*, 435 F.Supp. 335, 338 (S.D.Tex. 1977). Therefore, it will be recommended that the defendants' motion to dismiss be granted as to claims under 42 U.S.C. § 1982.

Sixthly, plaintiff asserts a cause of action for employment discrimination under Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.* Section 2000e-5(e) indicates that a charge of employment discrimination shall be filed with the Equal Employment Opportunity Commission [EEOC] within 180 days after the allegedly unlawful practice has occurred. However, if state proceedings are instituted, then the charge must be filed within 300 days of the conduct complained of or within thirty (30) days after termination of the state proceedings. Only after a claim is presented to the state agency and/or the EEOC and the appropriate action is taken at that level, may a civil suit be filed. See 42 U.S.C. § 2000e-5(f)(1). In the instant case, there is no evidence that plaintiff has filed an administrative claim with either the EEOC or the State of Maryland. He is therefore precluded from pursuing a Title VII action in this court. Accordingly, it will be recommended that plaintiff's claim under Title VII be dismissed.

Finally, plaintiff seeks damages for exposure to carcinogens and breach of contract. As to the harmful exposure claim, plaintiff has not alleged the jurisdictional and factual bases or the damages he has actually suffered. He has also set forth neither the relevant facts nor the jurisdictional basis of the breach of contract cause of action. Thus, plaintiff will be given twenty (20) days to particularize these claims.

The plaintiff should be advised that failure to particularize as ordered may result in dismissal of his claims. Considering the clarification of claims still required by plaintiff, his motion to compel discovery will be denied without prejudice, and defendants' motion for protective order will be granted.

Accordingly, for the foregoing reasons, it is this 27th day of February, 1987, by the United States District Court for the District of Maryland, ORDERED:

1. That, within twenty (20) days of the date of this order, defendants file a motion for summary judgment with necessary supporting documents relevant to plaintiff's claim under U.S.C. § 1983;
2. That, within twenty (20) days of the date of this Order, plaintiff set forth with particularity the facts supporting his 42 U.S.C. § 1983 claim;
3. That, within twenty (20) days of the date of this Order, plaintiff set forth with particularity the facts supporting his 42 U.S.C. § 1985(3) claim;
4. That, within twenty (20) days of the date of this order, defendants file a motion for summary judgment with necessary supporting documents relevant to plaintiff's claim under the Fifth and Fourteenth Amendments;
5. That, within twenty (20) days of the date of this Order, plaintiff set forth with particularity the facts supporting his Fifth and Fourteenth Amendment claims;
6. That, within twenty (20) days of the date of this Order, plaintiff set forth with particularity the facts supporting his 42 U.S.C. § 1981 claim;
7. That, within twenty (20) days of the date of this Order, plaintiff set forth with particularity the facts supporting his claims for harmful exposure and breach of contract and the jurisdictional bases therefore;
8. That plaintiff's motion to compel BE, and the same hereby IS, DENIED without prejudice;

9. That defendants' motion for protective order BE, and the same hereby IS, GRANTED;

10. That Clerk of Court shall mail copies of the foregoing Memorandum and Order to plaintiff and counsel for the defendants.

DANIEL E. KLEIN, JR.
United States Magistrate

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES GEORGE WALKER

v.

SUBURBAN HOSPITAL ASSOC., et al.

Civil Action No. JH-86-962

MAGISTRATE'S REPORT AND RECOMMENDATION

On March 24, 1986, plaintiff filed this *pro se* civil action against Suburban Hospital Association and ten other named defendants. On February 27, 1987, Magistrate Klein stated that he would recommend the dismissal of two of the plaintiff's nine claims (42 U.S.C. Section 1982 and Title VII of the Civil Rights Act). In addition, Magistrate Klein ordered the plaintiff to particularize his claims and ordered the defendants to file a motion for summary judgment based on plaintiff's 42 U.S.C. Section 1983, fifth amendment and fourteenth amendment claims. The parties have complied with that order and, for the reasons that follow, it is recommended that all of the plaintiff's claims either be dismissed or judgment entered for defendants.

Defendants, in their motion for partial summary judgment, argue that plaintiff's claims based on 42 U.S.C. Section 1983 and the fifth and fourteenth amendments must fail because they lack an essential ingredient - namely, state action. The defendants make clear, in their memorandum and supporting affidavit, that Suburban Hospital is a private, non-profit corporation managed by a Board of Trustees whose members are all private citizens. The individually named defendants in this action are all private citizens and were employees of the Hospital for all times relevant to this action.

The plaintiff argues that the Hospital's receipt of federal funds makes it a "federal actor" and thus brings its actions within the

parameters of the challenged claims. The caselaw, however, leads to a different result. While it is true that the Hospital has participated in the federal Hill-Burton Act construction program, 42 U.S.C. Sections 291 *et* seq. (1974), and has received as a result federal funding, it has been expressly held that such funding does not transform the defendant into a state or federal actor. *Modaber v. Culpeper Memorial Hospital. Inc.*, 674 F.2d 1023, 1026 (4th Cir. 1982). *See also Carter v. Norfolk Community Hospital Association*, 761 F.2d 970, 972 (4th Cir. 1985).

Furthermore, the fact the hospital accepts patients whose medical care is paid partially, or in full, through medicare or medicaid, is also of no consequence. *Modaber*, 674 F.2d at 1026-27. In *Traegesser v. Libbie Rehabilitation Center*, 590 F.2d 87 (4th Cir. 1978), the appeals court upheld the district court's dismissal of that plaintiff's Section 1983, fifth and fourteenth amendment claims because the receipt of medicare and medicaid funds was found not to fulfill the state action requirement of those claims. It is therefore recommended that this Court enter judgment for the defendants on the claims under Section 1983 and the fifth and fourteenth amendments.

Next, plaintiff's 42 U.S.C. Sections 1981 and 1985(3) claims are based on the alleged acts of the defendant which the plaintiff states are the product of race discrimination, the latter claim involving a conspiracy. There is a line of cases from this court holding that Title VII provides the exclusive remedy for employment discrimination claims. *Keller v. Prince George's County Department of Social Services*, 616 F. Supp. 540 (D.Md. 1985); *H.R. v. Hornbeck*, 524 F. Supp. 215 (D.Md. 1981); *Frye v. Grandy*, 625 F. Supp. 1573 (D.Md. 1986), and *Ryan v. Towson State University et al.*, Civil No. H-83-1571 (October 10, 1985) (a copy of which is attached hereto). Support for these cases may be found in the Supreme Court's decision in *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366, 99 S. Ct. 2345, 60 L.Ed.2d 957 (1979). In that case, the Court held that 42 U.S.C. Section 1985(3) could not be invoked to redress a violation of Title VII of the 1964 Civil Rights Act. To allow a Section 1985(3) claim to proceed based on Title VII, the Court found, would circumvent Congress' efforts to set up a specific set of remedies and procedures for dealing with such claims.

This same reasoning applies to Section 1981 claims based on violations of Title VII. *See Ryan*. Caselaw from other jurisdictions also compels the same result. *See Tafoya v. Adams*, 612 F. Supp. 1097, 1102 (D.Colo. 1985) and *Parson v. Kaiser Aluminum Chemical Corp.*, 727 F.2d 473, 475 (5th Cir. 1984). Thus, because plaintiff's Section 1981 and Section 1985(3) claims are based upon the same allegations as was his Title VII claim (which Magistrate Klein recommends be dismissed for failure to exhaust administrative remedies), it is recommended that those claims also be dismissed.

Finally, all that remains are plaintiff's tort and breach of contract claims. In response to Magistrate Klein's order of February 21, 1987, the plaintiff filed a memorandum setting forth this Court's alleged jurisdictional basis for those claims. These allegations, however, are insufficient. Regarding the contract claim, plaintiff alleges that this Court has jurisdiction under the contract clause. This clause, contained in Article I, Section 10, clause 1, states, in pertinent part, that "[n]o State shall . . . pass any . . . law impairing the obligation of contracts . . .." The clause, relied on frequently by the Supreme Court during the substantive due process era, has absolutely no application to plaintiff's complaint. The contract clause is a limit upon the *State*, not private actors and not, most importantly, any of the named defendants. Regarding the tort claim, the plaintiff has failed to set out any jurisdictional basis under which this Court may decide the claim. Thus, it is recommended that the contract and tort claims both be dismissed for lack of jurisdiction.

Therefore, for the foregoing reasons, the undersigned respectfully recommends that plaintiff's claims based on 42 U.S.C. Sections 1981 and 1985(3), as well as the contract and tort claims, be dismissed. It is further recommended that partial summary judgment be granted for the defendants on the claims based on 42 U.S.C. Section 1983, and the fifth and fourteenth amendments. Finally, it is recommended that plaintiff's 42 U.S.C. Section 1982 and Title VII claims be dismissed for the reasons set out in Magistrate Klein's Memorandum and Order of February 21, 1987.

DEBORAH K. CHASANOW
United States Magistrate

Dated: April 29, 1987

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES GEORGE WALKER

v.

SUBURBAN HOSPITAL ASSOCIATION, et al.

Civil Action No. JH-86-962

MAGISTRATE'S REPORT AND RECOMMENDATION

This case has been referred to the undersigned for disposition of all discovery disputes and recommendations for disposition of motions to dismiss and/or for summary judgment. Plaintiff alleges racial discrimination based on 42 U.S.C. § 1981[1] and asserts tort and contract claims.[2] Currently before the court is defendants' motion for summary

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[1] Plaintiff originally alleged discrimination under 42 U.S.C. §§ 1981, 1982, 1983, and 1985; the fifth and fourteenth amendments; and Title VII of 42 U.S.C. § 2000e. (Paper No. 3). By order of May 22, 1987, plaintiff's §§ 1981, 1982, 1985, and Title VII claims were dismissed; partial summary judgment was granted to defendants on the § 1983 and fifth and fourteenth amendment claims. Plaintiff appealed to the Fourth Circuit. Remand was ordered as to the § 1981 claim based on *Keller v. Prince George's County*, 829 F.2d 952 (4th Cir. 1987), which was decided after this court's ruling. That case held that the filing of a Title VII claim does not preempt an employment discrimination claim brought under § 1981.

[2] The Fourth Circuit referred to these as pendent state law claims and remanded them along with the § 1981 claim. Plaintiff, however, made the contract claim under Article VI of the United States Constitution and asserted no jurisdictional basis for the tort claim (Paper No. 22), despite specific instructions to do so. (Paper No. 21 at 8). Thus, this court's earlier dismissal was predicated on a lack of a federal jurisdictional basis. (Papers No. 28 and 25). Nevertheless, given the Fourth Circuit's construction of these as pendent state claims, they are treated as such herein.

judgment and plaintiff's opposition to it. For the reasons that follow, it is respectfully recommended that the defendants' motion for summary judgment be granted as to the § 1981 claims. Dismissal of the pendent state claims is recommended as well as one does not meet the test for exercise of pendent jurisdiction and, further, the court need not exercise jurisdiction over pendent claims after disposing of the federal claim prior to trial.

Named as defendants in this suit are Suburban Hospital Association, Joan Finerty, Paul Quinn, James Gary, Bernadette Welch, Charles Stewart, Lloyd Greene,[3] Dalton Williamson, Eric E. Johnson, Heidi Christl Marchand, and Aester Hailu. Plaintiff's § 1981 claims, as set out in his amended complaint, are somewhat unclear. (Paper No. 3). Defendants identify three areas of alleged discrimination: (l) Plaintiff was paid a lower starting salary than other pharmacists because he is black; (2) plaintiff received a lower shift differential than other pharmacists because he is black; and (3) plaintiff's suspension amounted to a discriminatory or constructive discharge. To these, the undersigned would add what is commonly referred to as a "work rule" claim. Plaintiff alleges that he was disciplined for engaging in prohibited conduct while similarly situated non-minority employees were not disciplined, or were less severely disciplined.

The Fourth Circuit has said the following about summary judgment:

> Summary judgment is proper only when it is clear that there is no dispute concerning either the facts of the controversy or the inferences to be drawn from those facts. *Morrison v. Nissan Motor Co.*, 601 F.2d 129, 141 (4th Cir. 1979); *Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir. 1950). The party seeking summary judgment carries the burden of showing that there is no genuine issue as to any material fact in the case. Fed. R. civ. P. 56(c); *Char-*

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[3] Although Lloyd Greene is not named in defendants' motion for summary judgment, this seems to be a mere oversight. Section D of defendants' motion asks for dismissal of the individual defendants. (Paper No. 78, p.42). Defendant Green is discussed along with defendants Finerty and Stewart. (Id. at 43). Therefore, it is recommended that defendant Greene be given an opportunity to join the motion formally.

> *bonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979). When determining whether the movant has met its burden, the court must assess the documentary materials submitted by the parties in the light most favorable to the nonmoving party. *Gill v. Rollins Protective Services Co.*, 773 F.2d 592, 595 (4th Cir. 1985).

Pulliam Inv. Co. Inc. v. Cameo Properties, 810 F.2d 1282, 1286 (4th Cir. 1987). Since plaintiff bears the burden of proof in the instant case, it is his responsibility to confront the defendant's motion for summary judgment with an affidavit or other similar evidence. In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Supreme Court stated:

> In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

Id. at 324. With these standards in mind, the inquiry may turn to the substance of plaintiff's allegations. As will be discussed below, there is no dispute as to the material facts in the instant case. The affidavits and exhibits submitted by defendants both soundly rebut plaintiff's meager attempt to establish a *prima facie* case of racial discrimination and conclusively establish legitimate non-discriminatory reasons for his salary and eventual dismissal. On the other hand, plaintiff has failed to confront the defendants' motion for summary judgment with an affidavit or other similar evidence of his own. Plaintiff's unsupported allegations therefore cannot stand.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Supreme Court outlined the general requirements for establishing a *prima facie* case of employment discrimination in hiring under Title VII. The plaintiff must show (i) that he belongs to a racial minority;

(ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. Id. at 802. That formula was:

> never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.

Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). While the test as enunciated in *McDonnell* applied to discriminatory hiring, the general principles are applicable to any employment discrimination case, including claims brought under § 1981. *Lewis v. Central Peidmont Community College*, 689 F.2d 1207, 1209 n.3 (4th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983) (citations omitted). In general terms, the test requires the plaintiff to prove that he is a member of a protected class and that the defendant treated him less favorably than similarly situated non-minority employees in circumstances from which intentional discrimination can be inferred. *Hervey v. City of Little Rock*, 787 F.2d 1223, 1231 (8th Cir. 1986) (citation omitted). A *prima facie* case of disparate treatment may be established without direct evidence of discriminatory intent. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). The *McDonnell Douglas* standard for a *prima facie* case is satisfied if the plaintiff presents:

> proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not those actions were bottomed on impermissible considerations.

Furnco Construction Corp. v. Waters, 438 U.S. 567, 579-80 (1978). If the court concludes that the plaintiff has presented a *prima facie* case, the defendant is given an opportunity to introduce evidence showing a legitimate non-discriminatory reason for its action, but it need not prove that it was actually motivated by the proffered reason. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981). The plaintiff is then afforded an opportunity to prove that the

defendants' proffered reason was a pretext for discrimination. *Burdine*, 450 U.S. at 256. However:

> The order of proof mandated by *McDonnell Douglas* does not require that evidence be produced in a compartmentalized form. Thus, plaintiff's evidence relevant to the issue of pretext can be as part of plaintiff's initial evidence which seeks to establish a *prima facie* case.. . . Likewise, defendant's evidence may be properly employed to both undermine plaintiff's ability to establish a *prima facie* case and to show that plaintiff was terminated for a legitimate nondiscriminatory reason.

McClain v. Mack Trucks, Inc., 532 F.Supp. 486 (E.D.Pa. 1982) (*citing Worthy v. United States Steel Corp.*, 616 F.2d 698, 701 (3d Cir. 1980)). Finally, to sustain a claim under § 1981, the plaintiff must prove discriminatory intent.[4] *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 583 n.16 (1984); *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1145 (4th Cir. 1986), *reh'g. granted on other grounds*, 108 S.Ct. 1419 (1988).

Salary Claims

1. Starting Salary

Plaintiff's allegations that he was paid a lower starting salary than white pharmacists who were hired after him are contained in paragraphs 6-12 and 27 of his amended complaint. (Paper No. 3).

Defendant points to the standard applied in *Witten v. A.H. Smith & Co.*, 36 FEP 271 (D.Md. 1984), to show that plaintiff has failed to meet his burden of presenting a *prima facie* case of discrimination. That case involved a plaintiff who alleged discrimination against him

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[4] In plaintiff's response to defendants' motion for summary judgment, he states that discrimination actions under 42 U.S.C. § 1981 can be based on disparate treatment or disparate impact and cites *Ingram v. Madison Square Garden Ctr. Inc.*, 482 F.Supp. 414 (S.D.N.Y. 1979). (Paper No. 80, p.2). That case was decided prior to the Supreme Court decision in *General Building Contractors Assn. v. Pennsylvania*, 458 U.S. 375, 390-91 (1982), in which the Court concluded that § 1981 can only be violated by purposeful discrimination and does not reach disparate effects alone. Thus, while evidence of disparate impact may be relevant to a § 1981 claim, such evidence is insufficient by itself to make out such a claim.

on the basis of race in the setting and payment of salaries, benefits, and other terms and conditions of employment. Judge Miller applied a modified version of the standard requirements for a *prima facie* case under *McDonnell Douglas*. Adapting that test for this case, plaintiff would have to show: (1) That he is a member of a protected class; (2) that plaintiff and non-members of the class worked for the defendant in similar capacities; and (3) that plaintiff was given a lower initial rate of pay or was paid a lower night differential than similarly situated non-members of the class. Id. at 273. Plaintiff is a black male, therefore, requirement no. 1 is satisfied. Regarding his salary claim, plaintiff has failed to show that he was similarly situated to the white pharmacists who were hired after him and who received higher salaries. On the other hand, defendants' submissions show that the pharmacists who were started at higher salaries than plaintiff had more hospital experience and/or higher educational qualifications than he. (Paper No. 78, pp. 31-36 and Exhibit A, Affidavit of Bernadette Welch and attachments thereto).[5] This showing may be used either to thwart plaintiff's attempt to show that he was similarly situated to those individuals, or to provide a legitimate, nondiscriminatory reason for the setting of salaries.

In her affidavit, Ms. Welch describes the criteria used for setting starting salaries for new employees. When hiring pharmacists, the hospital looked for licensed pharmacists with a hospital background who were experienced in compounding IVs, TPN mixing, and with the unit dose ("UD") system. This is reflected in copies of the ads that were run in the Washington Post on March 4 and 11, 1984. (Exhibit A and Attachment 1). Ms. Welch credited the plaintiff with three months hospital experience because his experience as a hospital pharmacist was limited to working as the weekend pharmacist at Capital Hill Hospital from December 1983 to March of 1984. Plaintiff's application also reflects that he worked at Providence Hospital from September of 1980 through March of 1984 as a pharmacy technician. This experience was not credited because it was not pharmacist experience. (Exhibit A at 2 and Attachment 2). Ms. Welch

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[5] Bernadette Welch is identified in her affidavit as the Director of Personnel at Suburban Hospital while plaintiff was employed there. Although the exhibits attached to Ms. Welch's affidavit have not been individually authenticated, she refers to the contents of these exhibits in her affidavit. (Exhibit A).

further states that when plaintiff complained in January of 1986 that he was not being paid a salary comparable to that of white pharmacists, she reviewed the salaries of all pharmacists hired subsequent to the plaintiff. Her investigation revealed that in each case but one, those pharmacists had considerably more hospital experience than the plaintiff and several had advanced degrees in pharmacy studies. (Exhibit A at 3-4). Further, the one pharmacist who was paid a lower salary than Mr. Walker, John Dorcas, who was also black, had no hospital experience as a pharmacist. (Id. at 4 and Attachment 11). Ms. Welch also notes that two minority pharmacists, one Asian and one black, were receiving higher salaries than some white pharmacists. (Exhibit A and Attachments 4 and 12). Thus, the plaintiff fails to make out a *prima facie* case of discrimination based on lower salary. Moreover, even if it were assumed that a *prima facie* case were made simply by showing that plaintiff received a lower salary than other pharmacists, the defendants' affidavits and attachments successfully rebut plaintiff's allegations of discrimination by putting forth legitimate non-discriminatory reasons for the differences, namely the differing experience and educational levels.

Plaintiff, on the other hand, does not successfully establish that these reasons are a pretext. His response to defendants' motion for summary judgment is not accompanied by an affidavit, nor is it made in accordance with 28 U.S.C. § 1746. In paragraph 18, entitled "Miscellaneous Points," plaintiff attempts to rebut defendants' evidence. (Paper No. 80, paragraph 18, A-I). These remarks will be addressed in order:

A. "The advertisement for the night pharmacist did not indicate the amount of hospital experience." While this statement may be true, it does not prove discrimination. Ms. Welch states that hospital policy on salaries was to award higher starting salaries to employees with more experience. This is an entirely reasonable manner of setting starting salaries and is a common practice in the business world.

B. "The affidavit of Defendant Welch does not indicate that Barbara Dowd had a Maryland Pharmacy License before being hired by Suburban." Again, plaintiff's statement is true, but it does not address the relevant question. The affidavit does state that "Ms. Dowd held a pharmacy license from Ohio but did not begin work at Suburban

until she had made application to convert her Ohio license to a Maryland license." (Exhibit A at 3). Thus, plaintiff's attempt to make it appear that Ms. Dowd was not a qualified candidate because she did not have a Maryland license, yet was paid a higher rate than he, must fail.

C. "It appears that the salaries of Eric Johnson and Dalton Williamson are the same. Yet Williamson was supposed to be the Supervisor of Eric Johnson." Not only does this not indicate discrimination against the plaintiff, but also, because Eric Johnson was white and Dalton Williamson was black, that would tend to support the defendants' claim that their salary policies were race neutral.

D. "Neither the Statement of Dalton Williamson nor the Statement of Daniel Yirenkyi are notarized." While they are not notarized statements, both were made under penalty of perjury and therefore are in accordance with 28 U.S.C. § 1746. (Exhibits B and C). Furthermore, neither statement is relevant to the issue of salary.

E. "The value of plaintiff's legal training was praised in an evaluation of him at Suburban." Whether or not this is true, it does not change the fact that legal training is not related education as it is applied by the defendant in setting starting salaries for pharmacists. (Affidavit of B. Welch, Exhibit A at 2).

Point F is not related to plaintiff's claim of discrimination based on salary and will not be addressed here. The relevance of Points G and H is murky and will be tangentially discussed below.

I. "Marchand received her Pharmacy Degree in 1982. James G. Walker received his pharmacy degree in 1982." Once again, plaintiff may be making a true statement, but he does not go far enough in his consideration of the facts. While defendant Marchand may have received her bachelor's degree in 1982, she went on to earn a Doctor of Pharmacy degree in 1984, and had one year of staff experience as a pharmacist. (Exhibit A at 5, and Attachment 16). Thus, a higher starting salary is justified in view of defendant Marchand's qualifications. In his amended complaint, plaintiff cites the fact that defendant Marchand was given a retroactive pay raise as one indication from which we may infer discrimination in the setting of salaries. However, this is also rebutted in the Affidavit of Bernadette Welch. Dr. Marchand was assigned as a clinical pharmacist coordinator at the hospital.

The subsequent adjustment in pay was made in connection with this change in title. (Exhibit A at 5). The closest plaintiff comes to discussing this is in point H where he states "if Marchand worked as a 'clinical pharmacist' without a Pharm D. degree means that a Pharm D. is not necessary to work as a 'clinical pharmacist.'" Point G makes a similar statement regarding pharmacy experience as related to advancement. Neither remark supports a finding of discrimination.

Plaintiff cites two cases to support his claim of salary discrimination. The first case is *McDaniel v. Board of Public Instruction for Escambia County, Fla.*, 39 F.Supp. 638 (N.D.Fla. 1941). This case involved claims brought under the fourteenth amendment due process and equal protection clause against the State of Florida for paying black teachers and principals lower salaries than white teachers and principals. The court held that where the plaintiffs had equal qualifications and experience, the discriminatory practice was a violation of the fourteenth amendment rights of plaintiffs. The second case is *Hishon v. King*, 467 U.S. 69 (1984). This case provides an employer may not discriminate in the terms, conditions, or privileges of employment. "A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion . . .," id. at 75. (Plaintiff's arguments on salary). There is nothing in either case to contradict the reasoning set forth above. Plaintiff has failed to show that he was similarly situated with those who received higher starting salaries.

Based on the above, it is respectfully recommended that the defendants' motion for summary judgment be granted in relation to the charge of discrimination in setting initial salaries.

2. Differential for Night Shift

The record is somewhat muddled regarding the claim of discrimination in the amount of night differential paid. In his amended complaint, at paragraph 26, the plaintiff states that he "was not paid night differential pay: others were." (Paper No. 3). In his response to defendants' motion for summary judgment, plaintiff reiterates this claim. (Paper No. 80, paragraph 15). Further, plaintiff points to defendants' answer to the amended complaint, paragraph 26, where the defendants admit the allegations contained in paragraph 26 of the amended complaint. (Paper No. 36, paragraph 26). Plaintiff's deposi-

tion, however, presents a very different contention. There he stated that he did receive some shift differential and that registered nurses received a higher night differential than did pharmacists. (Plaintiff's Deposition, p.61, Appendix to Memorandum of Law in Support of Defendants' Motion for Summary Judgment). It is apparent from his deposition that this is the discrimination he is referring to. Plaintiff stated "[w]e both have licenses from the State of Maryland. *I only get $1.35* and they get more money." (Id., lines 20-21) (emphasis added). And, when asked if it was his claim that other night shift pharmacists received a higher night shift differential than he did, the plaintiff responded, "I don't think that I ever stated that. I stated that the nurses received night shift differential and I did not." (Id. at 64, lines 14-16). Thus, the plaintiff has contradicted his own allegations in his deposition. In light of this, it would not be in the best interest of justice to hold defendants to their admission in their answer to plaintiff's amended complaint. No purpose would be served in taking this issue to trial. By no stretch of the imagination can plaintiff establish a genuine dispute of material fact sufficient to preclude summary judgment. A genuine issue of fact precluding summary judgment is one that can be maintained by substantial evidence. *Mack v. W.R. Grace Co.*, 578 F.Supp. 626, 630 (N.D.Ga. 1983). Further:

> [i]n ruling on the motion for summary judgment, the court may not decide issues of fact.. . . The plaintiff and the defendants motions for summary judgment must be reviewed independently, . . . and in the case of each, all reasonable doubts about the facts are to be resolved and all inferences from the facts are to be drawn in favor of the party opposing the motion.. . . The party opposing the motion for summary judgment need not respond to it with affidavits or other evidence until the moving party carries its burden of showing that no material fact is in dispute.. . . Once the moving party makes convincing showing, however, the opposing party must demonstrate by receivable facts that a real controversy exists.. . . At that point mere allegations unsupported by evidence cannot defeat summary judgment.

(Id.) (citations omitted). Even when the evidence is viewed in the light most favorable to this plaintiff, this burden is not satisfied.

In defendant Welch's affidavit, she states that the plaintiff was paid a shift differential of $1.35 because he was to work on the night shift and that that differential was the same as that paid to other pharmacists on the night shift. She cites Greg Petzold, a white pharmacist, as an example of a night pharmacist who also received $1.35 as a night shift differential. Attachment 3 to her affidavit is Mr. Petzold's employment application. On page 4, the amount of his shift differential is stated to be $1.35. This is the same as is shown on the plaintiff's application. (*See* Exhibit A, Attachment 2). Furthermore, Robert Jackson also received the same shift differential. (Exhibit A, Attachment 13). The only pharmacists whose applications indicate that they received a higher shift differential were Melissa McGowan, Patricia Delk, and John Dorcas. The applications of these three pharmacists indicate that they were to receive $1.41 in shift differential. On two of the applications, those of Delk and Dorcas, it was indicated that they would be working the evening shift. It is therefore logical to assume that Melissa McGowan was receiving $1.41 because she also was working the evening shift. (Exhibit A, Attachments 5, 7, and 11). The record is replete with references that establish that plaintiff worked the night shift. Therefore, he was not similarly situated to pharmacists working the evening shift. A difference in differentials that is based on different shifts cannot be considered discriminatory. Therefore, the plaintiff cannot prove discrimination in the amount of shift differential he received insofar as the other pharmacists are concerned. Moreover, nurses and pharmacists, while they are both licensed by the State of Maryland, are not performing the same duties and cannot be considered similarly situated. Defendant Welch's Affidavit sets forth a legitimate non-discriminatory reason for the difference in shift differential paid to RN's and LPN's. The hospital was having difficulty recruiting sufficient numbers of nurses to work the night shift, hence, the increase in night shift differential for these personnel. (Exhibit A at 2). Defendant Welch also mentions the fact that night pharmacists were paid for 80 hours of work in each two-week period when they actually only worked 70 hours. This was done to provide a premium for those who worked the night shift. (Id.)

Thus, plaintiff has failed to satisfy his burden as to the claim of discrimination in night differential. It is respectfully recommended

that the defendants' motion for summary judgment be granted as to this claim.

Disciplinary Measures

In a discriminatory discipline claim, the respective burdens on the parties are as set out above. A plaintiff may make out a *prima facie* case by circumstantial evidence either by showing that his conduct did not merit the discipline or by showing that others of a different race were not disciplined as severely for similar misconduct. A defendant may rebut by articulating a legitimate, non-discriminatory reason for the discipline. Once an employer articulates such a reason, plaintiff then has the burden to show that the reasons offered by the employer were but a pretext for discrimination. At all times, plaintiff retains the ultimate burden of persuading the court that he has been a victim of intentional discrimination. *Moore v. Inmont Corp.*, 608 F.Supp. 919, 926 (D.C.N.C. 1985) (Black employee fired for breaching employer's fully published policy prohibiting smoking in particular areas on pain of immediate discharge could not establish that employer's legitimate, non-discriminatory reason for the discharge was pretextual).

1. Discharge

The first and foremost reason that plaintiff cannot prove discriminatory discharge is that he was not discharged and his suspension was not a constructive discharge. The general rule on constructive discharge is that, if an employer deliberately makes an employee's working conditions:

> so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee.

Young v. Southwestern Savings & Loan Assoc., 509 F.2d 140, 144 (5th Cir. 1975) (citations omitted). There is no indication in the record that this was the case here, nor does Mr. Walker offer evidence to substantiate this in his response to the motion for summary judgment. The one item of evidence that might suggest that approach was plaintiff's testimony at his deposition that another pharmacist, Boki, had been

placed on a seven-day suspension and that, when he returned to work, he was fired. (Plaintiff's Deposition at 192). However, although plaintiff stated that he expected that to happen to him, he further states that he failed to return to work because he felt that Suburban had already breached the contract by the suspension. Plaintiff does refer to another suspension incident that occurred on April 26, 1985, involving the improper preparation of an IV admixture by his supervisor, Eric Johnson, in his response to defendants' motion for summary judgment. (Paragraph 14). He refers the court to "Evidence Document-Report On IV incident 5/3/88," but did not attach that report to his response. (A copy of the report is attached to plaintiff's response to defendants' motion *in limine*. (Paper No. 93)). The report reveals that Mr. Johnson was given a three-day suspension for his involvement in the incident.[6] The fact that the supervisor in question was suspended for three days and yet was on the scene to be the involved in run-ins with the plaintiff shows that he was not fired when he returned from his suspension. Therefore, this would tend to negate the suggestion that a suspension is a mere precursor to termination. Finally, the letters sent to the plaintiff attached to his deposition as attachment 2 state clearly "you are expected to return to work on Monday, March 3, 1986, at 10:00 p.m." Thus, plaintiff has failed to show that the suspension was an attempt to terminate his employment amounting to a constructive discharge.

2. Suspension

A. Pretext

Plaintiff's claim that his suspension was discriminatorily motivated fails in any event. The defendants have successfully set forth a legitimate non-discriminatory reason for that suspension and plaintiff has utterly failed to establish that that reason is but a pretext. The record is replete with evidence of plaintiff's admitted insubordination toward his superiors and his deliberate disregard for hospital policies. For example, when plaintiff was told that he would have to do what his supervisor said, his response was: "I said, in a pig's eye, or something to that effect. It would be coded when you all do it."

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[6] This evidence is the subject of a motion *In limine* and is discussed further below. If this report and recommendation is adopted, then, of course, the motion will be moot.

(Plaintiff's Deposition at 144). Plaintiff also told Dalton Williamson, a supervisor, that he would not take orders from him anymore. (Id. at 210). At least three counseling memos are submitted by the defendants as substantiation for their claim that the plaintiff had been repeatedly reprimanded for insubordination and refusal to perform his duties (exhibits attached to plaintiff's deposition dated January 9, 1986, February 17, 1986, February 20, 1986).[7] At his deposition, Mr. Walker maintained that he considered the counseling memos to be harassment by Dalton Williamson, giving him unnecessary orders and ordering him to do "flunky work." (Id. at 254).

The closest plaintiff comes in attempting to rebut this is a statement in paragraph seven of his response to defendants' motion for summary judgment that the fact that an employee charging race discrimination was replaced with an individual of the same race may not rebut *prima facie* case of discrimination because the replacement may have been made to cover discrimination. He cites *Wofford v. Safeway Stores, Inc.*, 78 F.R.D. 460 (N.D.Cal. 1978). That statement may very well be true, however, the plaintiff does not offer any evidence as to who replaced him or why this would show that defendants' proof is but a pretext. The plaintiff's only other possible attempt at rebuttal is found in paragraph twelve where he cites to his employment agreement to claim that, by breaching his contract by suspending him without 30 days notice, defendants acted intentionally, maliciously, and in a grossly negligent manner because his contract does not speak of suspension, but rather of 30 days notice.

Even if the employment agreement that the plaintiff refers to as his contract were to be construed as one, it could not support his allegations.[8] (Plaintiff's Deposition, Exhibit 4). The clause Mr.

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[7] The exhibit number of the first deposition exhibit is not clear, but the second and third memos are identified as exhibits 16 and 17.

[8] The employment application filled out by Mr. Walker has a clause above the employee's signature that provides:

> I understand that nothing contained in this application or in the granting of an interview is intended to create an employment contract between Suburban Hospital and myself for employment or the providing of any benefit. No promises regarding employment have been made to me, and I understand that no such promise or guarantee is binding upon the

Walker refers to when he says that Suburban Hospital is required to give him 30 days notice before suspending him is paragraph seven. That paragraph reads: "Suburban Hospital reserves the right to discontinue this type of scheduling. If this type of scheduling is to be discontinued, the hospital will give the employee a minimum of 30 days notice'." The scheduling being referred to is found in paragraph one which reads: "I will work an alternating work week schedule consisting of seven (7) consecutive ten (10) hour night shifts on duty and the next seven (7) consecutive nights off duty." The only other paragraph that has any mention of notice in it is paragraph five, which reads: "If I decide to leave the employment of Suburban Hospital as a night pharmacist, I will give at least 30 days notice prior to my last day of employment." This merely obligates plaintiff to notify his employer if he intends to terminate his employment with Suburban. Thus, plaintiff's claim that Suburban Hospital breached its contract with him because they did not give him 30 days notice that they were going to suspend him cannot stand. Plaintiff has failed to establish that the defendants' stated reasons for the disciplinary actions were but a pretext for discrimination in regard to his suspension/termination.

B. Work Rule

The final claim that can be construed from plaintiff's factual allegations is what is commonly referred to as a "work rule" case. A plaintiff who alleges that he or she was disciplined for engaging in prohibited conduct while similarly situated non-minority employees were not disciplined, states a claim of discrimination. *Moore v. City of Charlotte, N.C.*, 754 F.2d 1100, 1105 (4th Cir. 1985). In order to demonstrate a *prima facie* case of this type of discrimination, plaintiff must prove (1) that he engaged in prohibited conduct similar to that of a person of another race, and (2) that the disciplinary measures enforced against the plaintiff were more severe than those enforced against the other person.[9] The defendants did not specifically address

> hospital unless made in writing. If an employment relationship is established, I understand that I have the right to terminate my employment at any time and that the hospital retains a similar right.

Thus, it would seem that the relationship between the plaintiff and the defendant was an employee at will relationship. There are several copies of the plaintiff's application attached to defendants' submissions. One can be found as deposition exhibit 3, another is attached to the affidavit of Bernadette Welch, exhibit A, as attachment 2.

this argument in their motion for summary judgment. The uncontroverted evidence, however, refutes this claim as well.

Plaintiff claims in his amended complaint that he was disciplined for failing to code cards while other pharmacists who also failed to perform this duty were not disciplined. (Paper No. 3, Paragraph 16). Plaintiff further alleges that Eric Johnson, a white pharmacist and a supervisor, improperly prepared an IV solution resulting in the death of a patient. These two allegations form the basis for plaintiff's work rule claim. In regard to the first argument, even if plaintiff's allegations that other pharmacists were failing to perform the coding duties are true, there is evidence in the record that establishes that plaintiff was not placed on suspension merely for his failure to perform this duty. Rather, it is clear that the plaintiff's insubordination played an important part in his suspension. (See discussion above). Plaintiff makes no allegation in any of his pleadings or in his response to the motion for summary judgment that other pharmacists also blatantly refused to perform these functions or referred to it as "flunky work" as he did; (See Plaintiff's Deposition, p.150-152). Plaintiff does refer in his response to the motion for summary judgment to the Eric Johnson incident. (Paper No. 80, Paragraph 14). It is true that Eric Johnson was somehow involved in such an incident and he was placed on a three-day suspension for that involvement. Moreover, defendant Johnson denied being responsible for the preparation of the mixture and it is unclear whether he was disciplined for preparing the mixture or for failing to report the incident promptly. (Plaintiff's Objections to Defendants' Motion *In Limine*, Attachment 2, p.2). It certainly has not been established that the behavior of Eric Johnson was a more serious breach of hospital regulations or procedures than were plaintiff's actions. The disciplinary action taken against plaintiff in suspending him for three days was not more severe than that assigned to the white pharmacist, Eric Johnson, and plaintiff has not made out a *prima facie* case that he was punished more severely for actions also engaged in by nonminority employees.

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[9] Although *Moore* involved Title VII claims of discrimination, an identical analysis is applied in reviewing disparate treatment claims in 1981 cases. *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1147 (4th Cir. 1986).

The only authority plaintiff cites for the impropriety of defendants' actions involving the IV incident is *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). That was a fourteenth amendment case dealing with arbitrary and unjust discrimination on the part of a municipality in its requirements for the establishment of laundries. That case has no application to this claim. Plaintiff has thus failed to establish a *prima facie* case of discrimination based on the work rule theory.

Thus, inasmuch as plaintiff has failed to substantiate his claims that the disciplinary measures taken by defendants were intentionally discriminatory, defendants are entitled to judgment in their favor.

Pendent State Claims

As set out in *United Mineworkers of America v. Gibbs*, 383 U.S. 715 (1966), there is a two-part test for determining when the exercise of pendent jurisdiction is appropriate. First, the court must determine whether it has the power to entertain the pendent claim and, second, whether, in its discretion, the court should entertain the claim.

> A court has power if: (l) there is a federal claim with "substance sufficient to confer subject matter jurisdiction on the court"; (2) the state and federal claims "derive from a common nucleus of operative fact"; and (3) "plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding."

Guyette v. Stauffer Chemical Co., 518 F.Supp. 521, 523-524 (D.N.J. 1981) (quoting *United Mineworkers of America v. Gibbs*, 383 U.S. at 725). However, the *Gibbs* Court cautioned that the power of a federal court to entertain a pendent claim "need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." *Gibbs*, 383 U.S. at 726 (footnote omitted).

> A federal court should exercise its discretion to dismiss pendent State claims l) when "considerations of judicial economy, convenience and fairness to litigants" are not present; 2) when needless decisions of a State law might be made by the federal court and "a surer-footed reading of applicable law" would be made in the State court; 3)

> when "it . . . appears that the State issues substantially predominate, whether in terms of proof, of scope of the issues raised, or of the comprehensiveness of the remedies sought," and the State claim is not closely tied to questions of federal policy; and 4) when there are reasons that are "independent of jurisdictional considerations, such as the likelihood of jury confusion in treating divergent legal theories of relief."

Mason v. Richmond Motor Co., Inc., 625 F.Supp. 883, 889 (E.D.Va. 1986) (quoting *United Mineworkers of America v. Gibbs*, 383 U.S. at 726-727). *See generally* 13B Wright & Miller § 3567.1 (1984); C. Wright, *Law of Federal Courts* § 19 (4th ed. 1983).

Plaintiff's tort claim, if construed as a state law cause of action, does not meet the test for pendent jurisdiction. The factual allegations concern his alleged exposure to carcinogens during his employment at Suburban Hospital. He sues for the speculative possibility that this exposure may cause him to get cancer, or may adversely affect any children he may have in the future. This claim is related to his § 1981 claim only in the remote sense that both claims arise from his employment at Suburban Hospital. This appears to be an insufficient connection to justify the exercise of pendent jurisdiction. This claim should be dismissed without prejudice.

Plaintiff's contract claim, on the other hand, does arise from a common nucleus of fact. This claim has already, in fact, been resolved by recommendations made earlier in this report. Specifically, plaintiff's entire contract claim is based on the erroneous premise that he had a contract with the defendant and that the contract entitled him to 30 days notice prior to suspension. That claim is refuted categorically by the plain language of the documents upon which he relies. Therefore, the court would be entirely justified in granting judgment to the defendants on the contract claim as well.

Alternatively, given that the federal claim is being disposed of prior to trial, the court may be inclined to dismiss the contract claim without prejudice. Several courts have specifically articulated the policy that courts should ordinarily refrain from exercising jurisdiction over pendent state claims when the federal claim is disposed of on a motion for summary judgment, *Buethe v. Britt Airlines, Inc.*, 749

F.2d 1235, 1240 (7th Cir. 1984); *Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187, 194 (3d Cir. 1976). If the court adopts the recommendation that summary judgment be granted in favor of the defendants on the federal claims, dismissal of the pendent state claims would also be within the court's discretion.

Conclusion

For the foregoing reasons, it is respectfully recommended that defendant Greene be given an opportunity to join the motion for summary judgment filed by the other defendants, that defendants' motion for summary judgment on the §1981 and contract claims be granted, and that the tort claim be dismissed without prejudice. (Alternatively, the contract claim may be dismissed without prejudice, as well.)

DEBORAH K. CHASANOW
United States Magistrate

Dated: December 13, 1988